12290

(16,323.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 191.

THE SMITHSONIAN INSTITUTION, APPELLANT,

vs.

LEVI W. MEECH AND SUSAN MARIA MEECH, HIS WIFE; STEPHEN T. MEECH, W. W. MEECH AND JAENNETTE MEECH, HIS WIFE; LUCY M. LORD AND JAMES LEANDER LORD, HER HUSBAND.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

LEVI W. MEECH *et al.*, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix, Defendants. } Equity. No. 16496.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill.

Filed June 4, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix, Defendants. } Equity. No. 16496.

To the honorable court:

The plaintiffs complains as follows:

1. They are an institution established by act of Congress for the increase and diffusion of knowledge among men and authorized by law to receive and hold property, real and personal, by gift, devise, or bequest for the purposes of said trust. They are represented by a secretary, and their business affairs are conducted at Washington, in said District.

2. The defendants Meech are the brothers and the defendant Lord is the sister, and they are all of the heirs-at-law of Lydia Tyler Avery, late of Washington, deceased, who was the wife of
2 Robert Stanton Avery, also late of Washington, deceased. They are sued as said heirs-at-law. The said Lydia died 18 November, 1890, and the said Robert 12 September, 1894, both at Washington. Julia N. Avery, defendant, is sued as she is executrix of the last will and testament of said Robert.

3. Said will was duly admitted to probate by this court, holding

a term for orphans' court business, 2d February, 1895, and the said Julia qualified as executrix and is proceeding to administer upon said estate. A copy of said will is hereby filed, marked Exhibit A No. 1, which plaintiffs pray may be taken as a part of this bill.

4. The said Robert by his said will bequeathes to the sister and brother of his late wife, meaning thereby the defendants Meech and the defendant Lord, one thousand ($1,000) dollars, to be equally divided between them, upon the condition that they acquiesce in the said will; and in the event of their not acquiescing, but disputing his said will, he gives the same to these plaintiffs as residuary legatees.

5. These plaintiffs aver that the defendant Lord and the defendants Meech, the sisters and brothers of the late wife of the said testator, have not acquiesced in his said will, but, on the contrary, have sought and still seek to defeat the same, and that they do dispute his said will in respect to an object cherished by the testator, to wit, the gift of a certain lot and house thereon, known as No. 326 A street southeast, in Washington, which lot and house was the property of the said testator at the date of his death, and which he had given to these plaintiffs and in specific terms included in the residuary bequest. These plaintiffs, by virtue of the terms of said will, and in pursuance of the cherished intention of the said testator, having accepted the devises and bequests of the said will, have entered into possession of said premises as lawful owners thereof; but the said defendants, disputing the will of said testator, and refusing to acquiesce in the disposition made by him of said premises, have by a writing of 23d May, 1895, addressed to the counsel of these plaintiffs, made formal demand for the possession of the same, claiming the fee-simple title thereto as heirs-at-law of said Lydia T. Avery.

The plaintiffs say that the said defendants have violated the condition of said bequest of $1,000 and forfeited all right thereto, and that the several shares of the said defendants, amounting in all to said sum of $1,000, pass by the terms of said will to these plaintiffs as residuary legatees, and that the same is payable to these plaintiffs.

6. The said Robert Stanton Avery lived to be 86 years of age. For many years he was in the employ of the Government in the Coast Survey office. He was frugal and self-denying, lived a quiet and retired life, and devoted himself to scientific research and experiment, chiefly in the matter of phonetic type. His wife was somewhat younger and apparently of more vigorous health than he. They were remote from society and lived plainly. His labor was severe and protracted, and to equip himself he had type made at a considerable expense, did his own printing, and performed work of an abstruse character, yet of scientific value.

3

They had no children. In pursuance of a plan, the motives and purposes of which Mr. Avery fully shared, the said Robert Stanton Avery, on the 13th September, 1882, executed a will, a copy of which is hereto appended, which plaintiffs pray may be taken as a part of their bill and marked Exhibit No. 2.

Said will reads in part: "I give unto my beloved wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition,—and I hereby direct her to pay the expenses of my funeral, which I desire may not be an expensive one."

It then proceeds: "Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exceptions as I may make hereafter in this will, or in codocils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safe keeping, and to use the income from it in extending the sciences by publishing with the phonetic printer's types I have invented and use, or other phonetic types found to be better, lectures, memoirs and treatises relating to them and containing new matter and especially such as treat of those parts of science depending on the mechanical laws of what is supposed to be an ethereal medium—such as automic chemistry, electrical and magnetic phenomena, and those of light and heat, all tending to the development of an ethereal philosophy. * * *

* * * This fund may be called the "Avery fund" or the "fund contributed by Robert T. Avery and his wife Lydia T. Avery for the extension of the sciences." * * *

By the testator's last will he gives certain small legacies, and then bequeathes all the residue of his estate, real and personal, to the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever, meaning these plaintiffs, and the plaintiffs have accepted said bequest and are prepared to gratify, so far as may be the wishes of the testator in making said gift, for the benefit of science.

7. The lot and house known as 326 A street is more fully described in the deed of purchase of the same as part of lot 2, in square 787; also a part of lot lettered I, in said square, being a small strip for convenience of access to alley in the rear of said house, said lot described in the deed being identical with that mentioned in the will.

The said Robert Stanton Avery, in April, 1885, not being in firm health and believing that his wife would survive him, bought of Timothy Sands the premises in question, they being next east of the house where Mr. and Mrs. Avery lived as their home.

4 Mr. Avery conducted the business of said purchase, and himself paid out of his own money the sum of $2,900, and assumed the liability of paying a balance of the consideration money, namely, $600, to the holder of a note of that amount secured by mortgage on the premises. This note of $600 Mr. Avery paid out of his own money in October, 1885. When the deed was to be made out by Mr. Sands, Mr. Avery directed that the name of his wife,

Lydia Tyler Avery, be inserted as grantee instead of his own. This was accordinly done. (A copy of said deed is herewith filed as Exhibit No. 3, and plaintiffs pray that the same be taken as a part of this bill.) Mrs. Avery accompanied her husband to the office of Mr. Sands' attorney, where Mr. Avery handed over the money and took the deed. The deed was delivered to Mr. Avery (not to his wife). Mr. Avery took the same to the registry of deeds, where it was recorded 21 April, 1885, in Liber 1118, fol. 278, and the record shows that the original deed was delivered to Mr. Avery 15 May, 1885.

The plaintiffs are informed and believe, and therefore aver, that Mr. Avery always treated this property as dedicated to his wife only in the event that she outlived him, and in that event for her life only. The plaintiffs are likewise informed and believe, and therefore aver, that Mrs. Avery so regarded her rights and privileges in said property. She believed that she had an interest in it so that she would enjoy the rents and profits of the same if she outlived her husband, which was thought likely, as she was in better health than he and younger, but that if she died first it was to go to him in order that with all his property at his death it would be given to the Smithsonian Institution, to carry out the plan which both Mr. and Mrs. Avery had in mind for the benefit of education and science.

As indicating such qualified ownership, plaintiffs say that a thorough search of the house in which Mr. and Mrs. Avery lived and died has brought to light only one paper that bears upon this transaction beyond the deeds and mortgage note, viz., a memorandum note, in handwriting of Mrs. Avery, dated October 26, 1885, a copy of which plaintiffs herewith file, marked Exhibit No. 4, and pray to be taken as a part of their bill. Said note uses language denoting not the single ownership of the writer but a joint interest. It does not say *me*, b t *us*, which word is used four successive times. The said Robert Stanton Avery collected the rents as his own and leased the same in his own name, as appears from the original of an indenture of agreement dated 20 September, 1887, between Robert S. Avery and Lorenzo D. Bumpus, which plaintiffs file herewith, marked Exhibit No. 5, and pray may be taken as a part of this bill. The said Bumpus entered under said lease and paid rent as a tenant of said Avery. Such payments were made to Mr. Avery and receipts given by him in his name as of his own property in the presence of Mrs. Avery, and with her full knowledge and consent.

The plaintiffs aver the fact to be that at the time of the purchase of this property by Mr. Avery it was expressly agreed by and between himself and his wife that said premises were to be deeded to her, not to give her the fee-simple title to the same, nor even to give her a life interest absolutely therein, but solely for the purpose of providing for her in the event of her husband dying before she should die, as that appeared almost certain would happen, and that Mrs. Avery was to make her will, giving the same to her husband, so that the general purpose of his will should apply to this after-acquired real estate.

The plaintiffs further say that Mrs. Avery repeatedly stated to her friends that the premises in question had been bought by Mr. Avery out of his earnings and savings; that title had been permitted to be taken in her name upon the express understanding and mutual agreement that, in the event of her death preceding that of her husband, he was to enjoy the same for his life, and then it was to go as a part of his estate to the Smithsonian Institution for the promotion of science, and that she expressed to an attorney-at-law her intention to have him prepare a will embodying such a disposition of the property, but her last illness resulted suddenly in her death, preventing her carrying such intention into effect.

Immediately upon the death of Mrs. Avery her husband took steps to place beyond controversy the facts of this conveyance. Besides executing a codicil to his will stating that the property was really his, though standing in the name of his wife, he made affidavit of the facts and procured the affidavits of six other persons, who knew from Mrs. Avery's conversation that she regarded the transaction to be—which affidavits these plaintiffs are ready to produce, but do not file as exhibits—all of them tending to prove that Mrs. Avery considered the provision to be for her in case she outlived her husband, and the property itself, in any event, after the death of her husband and herself to go to the Smithsonian Institution.

The plaintiffs have filed in the office of the register of deeds for this District to be recorded a declaration of ownership by them of said premises, together with the affidavit of the said Robert Stanton Avery in regard to said title, said papers having been filed of record May 15th, 1895.

Wherefore these plaintiffs say that the equitable title to said premises remained in said Robert Stanton Avery and passed to these plaintiffs by his last will; that the defendants, who claim as heirs-at-law of Mrs. Avery, knew substantially these facts, they having been stated to their counsel, and, notwithstanding their said knowledge, they have demanded possession of said premises, as hereinbefore alleged.

The plaintiffs, therefore, pray as follows:

1.

That this court by its order declare that the equitable title to the premises known as No. 326 A street southeast, being part of lot 2, in square 787, in the city of Washington, and part of lot lettered I, as described in deed of Timothy Sands to Lydia Tyler Avery,
6 recorded in Lib. 1118, fol. 278, of the land records of the District of Columbia, remain in Robert Stanton Avery, and is now by virtue of his will vested in the Smithsonian Institution.

2.

That the defendants Meech and Lord and each of them be perpetually enjoined from claiming title to said premises as heirs-at-law of the said Lydia Tyler Avery.

3.

That Julia N. Avery, executrix, defendant, be directed to treat the one thousand dollars given to the sister and the brothers of the testator as forfeited for breach of condition annexed to said legacy and as having fallen into the residium.

4.

That plaintiffs have such other or further relief in the premises as the nature of the case may require.

To which end the plaintiffs pray for process against the defendants Levi W. Meech, Stephen T. Meech, W. W. Meech, and Lucy M. Lord and the defendant, Julia N. Avery, executrix.

The defendants are Levi W. Meech, Stephen T. Meech, W. W. Meech, Lucy M. Lord, and Julia N. Avery.

S. P. LANGLEY,
Secretary of the Smithsonian Institution.

FRANK W. HACKETT,
Solicitor for Pl'ffs.

PLAINTIFFS' EXHIBITS Nos. 1, 2, 3, 4, & 5.

Filed June 4, 1895.

EXHIBIT No. 1.

I, Robert Stanton Avery, 2nd, of the city of Washington, in the District of Columbia, being conscious of the uncertainties of life and having full use of the faculties of a sound mind, do make and publish this instrument in writing as and for my last will and testament, hereby expressly revoking and annulling all and every such testamentary paper and codicil or codicils thereto by me heretofore executed.

I hereby nominate and appoint my niece Julia N. Avery executrix of my last will and testament requesting that she be required to give no security or bond as such.

In addition to her commissions as executrix I bequeath to her, in recognition of her care of me, two thousand (2,000) dollars to be paid so soon after my death as conveniently may be, and also during her life the coupons maturing upon the two thou-
sand dollars which I now have invested in five *per cent.*
7 gold-bearing bonds of the Northern Pacific Railroad Com-
pany; should such bonds be paid during her life the principal shall be reinvested and the interest derived therefrom shall be paid to her during life. Upon her death the principal shall fall into the residuary fund hereinafter created.

I bequeath the sum of four hundred (400) dollars to be equally divided among the children of my brother Ulysses, living at the time of my death.

I bequeath the sum of four hundred (400) dollars to be equally divided among the children of my brother Isaac other than my niece Julia for whom I have already provided.

I bequeath to my sister Sarah and to my brothers John and Erasmus four hundred (400) dollars each, in all twelve hundred dollars.

I bequeath to the sister and brothers of my late wife one thousand dollars (1,000) to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

Having always had a love for the sciences and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire, but do not require, that the income derived by the Smithsonian Institution from this gift may be applied, so far as it may determine, to promoting publications in such type of scientific publication, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require that such part of said income as the said institution shall determine shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing an etherial medium which are treated of in atomic chemistry and which are supposed to govern phenomena of electricity, magnetism, light and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like however to have published first the multiplying table and also IV-plate, logar-thms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers, and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called "the Avery fund" or "the
8 fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences," and all publications made from the fund shall bear this inscription.

The property known as part of lot 2 (two) in square 787 in the city of Washington, D. C., being premises No. 326 A St. S. E., is my property although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution.

In testimony of all whereof I have hereunto set my hand and seal this 22nd day of July 1893.

(Signed) ROBERT S. AVERY. [SEAL.]

Signed, sealed, published, and declared by the above-named tes-

tator as and for his last will and testament in our presence, who, in his presence and in the presence of each other and at his request *and at his request*, have hereunto signed our names as witnesses hereof.

(Signed) LEON L. FRIEDRICH.
(Signed) LELAND P. SHIDY.
(Signed) JOS. M. JOHANNES.

EXHIBIT No. 2.

Copy.

I, Robert Stanton Avery 2d, of the city of Washington in the District of Columbia, being conscious of the uncertainties of life and having the full use of the faculties of a sound mind, do make and publish this my last will and only will and testament, in the following form and manner.—I give unto my beloved wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition; and I hereby direct her to pay the expenses of my funeral, which I desire may not be an expensive one.—

Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to give all my real and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safe keeping and to use the income from it in extending the sciences by publishing, with the phonetic printer's types I have invented and use-, or other phonetic types found to be better, lectures, memoirs, or treatises relating to them and containing new matter, and especially such as treat of those parts of science depending on the mechanical laws of what is supposed to be an ethereal medium, such as atomic chemistry, electrical and magnetic phenomena, and those of light and heat, all tending to the development of an ethereal philosophy.

Prizes may be given for such essays on these and kindred
9 subjects as may by the rules of publication of the institution be found worthy of diffusion.—

But the multiplying table, and also the IV-place logarithms, written by me and now electrotyped must first be published; and then the V-place logarithms I have nearly finished in manuscript must be completed and electrotyped with my new figure types and published; and then the tables of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out, must be finished in like manner electrotyped and published.

This fund may be called "the Avery fund" or "the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences," and all publications made with this fund

must have a note thereon stating that they have been thus published.

After the death of my wife, the Board of Regents of the Smithsonian Institution will be expected to select an executor of this will and provide for making the fund as useful as possible, limiting its use as much as they can to the objects specified.

In witness whereof, I have hereunto set my hand and seal, this thirteenth day of September anno Domini one thousand eight hundred and eighty-two.

ROBERT STANTON AVERY. [SEAL.]

The above-written instrument was subscribed by the said Robert Stanton Avery in our presence, and he at the same time published and declared *to* above instrument so subscribed to be his last will and testament, and we, at the testator's request and in his presence, have signed our names as witnesses hereto.

JAS. A. TAIT.
MORGAN F. MOUNT.
LELAND P. SHIDY.

In view of the fact that my wife departed this life on the 18th day of November, A. D. 1890, without a will and without issue and for other reasons, I add this, my first codicil to my last will and testament, dated the thirtieth (30th) day of September, A. D. 1882, and hereto attached:

The property known as part of lot two (2) in square 787 or premises No. 326 A street, southeast, was purchased and paid for by me on the twentieth (20th) day of April, A. D 1885, subsequent to the above date and was taken in the name of my wife Lydia T. Avery, by my permission and upon the express understanding and condition, that she, the said Lydia T. Avery would make a will in my favor, as will more fully appear by reference being had to seven (7) certain affidavits filed with the recorder of deeds of the District of Columbia in any suit that may be instituted by those named as the trustees of my estate. Therefore, in order to carry out more fully my wishes, as expressed in the aforesaid will which I herewith republish and declare in every particular, except as herein modified, I give, devise and bequeath to the Regents of the Smithsonian Institute and to two members of the National Academy of Science, to be, by said Regents selected and their successors forever, all my real estate, personal and mixed, wherever situate or being and whether owned by me at the date of this codicil or subsequently acquired, with full power to sell or encumber the same by mortgage or deed of trust, without requiring the purchaser or purchasers to see to the application of the purchase-money, in trust for the purposes and objects particularly set forth and enumerated in the will by me executed and hereto attached.

In testimony of which I have hereunto set my hand this 20th day of December, A. D. 1892.

ROBERT STANTON AVERY.

Signed, published, and declared by Robert Stanton Avery as and for the first codicil to his last will and testament, dated the 30th of September, A. D. 1882, in the presence of us, who, at his request and in his presence and in the presence of one another, have subscribed our names as witnesses thereto.

JAS. A. TAIT,
LELAND P. SHIDY,
JOHN F. COX,
All of Washington, D. C.

I have concluded to add this, my second codicil to my last and only will and testament, dated the thirteenth day of September, A. D. 1882, and hereto attached:

I give to my niece Julia N. Avery, who lives with me, two thousand dollars to be paid in money when my estate is settled; and while she lives, the coupons from the two thousand dollars I have of the five per cent. gold-bearing bonds of the Northern Pacific railroad. I give to my sister and brothers nephews and nieces two thousand dollars to be distributed as follows, to the children of Ulysses four hundred, to the children of Isaac four hundred, to Sister Sarah and Brothers John and Erasmus four hundred each. I give to the sister and brothers of my late wife one thousand dollars, to be divided equally between them. I have already given them over a thousand which my wife had inherited from her father, also clothing and other things. So my present codicil will make the gifts to her family and to mine nearly equal. These gifts are made on the condition that no attempt be made to break this will, and that if such an attempt be made, those who engage in it are to lose their claims to the gifts here made to the-. I desire that all proper efforts be made to introduce the phonetic books and types I have been preparing, and I believe the executors of this will and its codicils will see the importance of doing this and act accordingly.

In testimony of which I have hereunto set my hand this 19 day of May, A. D. 1893.

ROBERT STANTON AVERY.

Signed, published, and declared by Robert Stanton Avery as and for the second codicil to his last will and testament, dated
11 the 13th of September, A. D. 1882, in the presence of us, who, at his request and in his presence and in the presence of one another, have subscribed our names as witnesses thereto.

LEON L. FRIEDRICH, M. D.
LELAND P. SHIDY.
JOSEPH M. JOHANNES.

These three witnesses personally appeared before me and acknowledged their signatures to this codicil.

JAS. A. TAIT,
Notary Public.

Exhibit No. 3.

This indenture, made this 20th day of April, in the year of our Lord one thousand eight hundred and eighty-five, between Timothy Sands of Washington, D. C. party of the 1st part and Lydia Tyler Avery of the same place party of 2d part.

Witnesseth, That the said Timothy Sands for and in co-sideration of the sum of thirty-five hundred dollars, current money of the United States, to him in hand paid by the said party of the second part, the receipt of which before the ensealing and delivery of these presents, is hereby acknowledged, has granted, bargained, and sold, aliened, conveyed and confirmed, and by these presents does grant, bargain, and sell, alien, enfeoff, convey, and confirm, unto and to the use of the said Lydia Tyler Avery her heirs and assigns, all the certain piece or parcel of land and premises situate and being in the city of Washington, District of Columbia, and known and distinguished as all the certain piece or parcel of land upon the official plat of said city as part of lot No. two (2) in square No. seven hundred and eighty-seven (787) and more fully described by metes and bounds as follows—commencing eleven (11) feet nine and one-half (9½) inches from the southwest corner of said lot No. two (2) in square No. seven eighty-seven (787) and running thence east forty-two feet two & ½ inches (2 & ½) to the dividing line between lots one (1) and two (2) of said square—thence at right angles on said dividing line north eighty (80) feet—thence at right angles west twenty (20) feet—thence at right angles north thirty (30) feet—thence at right angles west twenty-two (22) feet and two & a half (2 & ½) inches—thence at right angles south one hundred and ten (110) feet to the place of beginning—being the same premises conveyed to Harmon M. Brush by Thos. H. G. Todd and Francis A. Todd his wife recorded — Liber 920—fol. 184 &c. Also the following-described real estate known as part of lot lettered I in said square described by metes and bounds as follows—commencing at the southwest corner of lot lettered I in said square. Thence running east along the south line of said lot four (4) feet—thence north at right angles three (3) feet—thence at right angles west four (4) feet—thence at right angles south three (3) feet to the place of beginning—being a part of Emil Friedrich's subdivision of lot fifteen (15) and north 33 feet 1 inch of lot 16, into lot F, being the same premises conveyed to Harmon M. Brush by Rudolph Friedrich surviving trustee &c. by deed recorded in Liber 1067 fol. 218 &c., together with the rights, easements, privileges and appurtenances to the same belonging or in anywise thereto appertaining.

12

To have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said Lydia Tyler Avery her heirs and assigns.

And the said Timothy Sands party of the first part his heirs, executors and administrators does hereby covenant with said party of

the second part her heirs and assigns, that the said hereinabove-described land and premises, with the appurtenances, unto said party of the second part her heirs and assigns, from and against all persons claiming by, through or under said party of the first part or his heirs and assigns except as — $600 and interest to be paid June 1st 1886 on trust deed, the said party of the first part and his heirs shall and will forever warrant and defend by these presents; and further, that any act or deed deemed by counsel, learned in law, requisite and necessary the more perfectly to assure unto said party of the second part her heirs and assigns, the said land and premises hereinabove granted, the said party of the first part and his heirs shall and will at all times, at the cost of the person requesting the same, do, perform, execute, and deliver.

In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

TIMOTHY SANDS. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES B. WIMER.
GEO. C. HAZELTON.

DISTRICT OF COLUMAIA, *County of Washington*, } *To wit:*

I, James B. Wimer, a notary public in and for the county and District aforesaid, do hereby certify that Timothy Sands, of Washington, D. C, party to a certain deed bearing date on the 20th day of April, A. D. 1885, and hereto annexed, personally appeared before me, in the District aforesaid, the said Timothy Sands being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 20th day of April, A. D. 1885.

[NOTARIAL SEAL.] J. B. WIMER,
Notary Public.

Endorsement: Received for record on the 21, 9 a. m., day of April, A. D. 1885, and recorded in Liber No. 1118, folio 278 *et seq.*

13 EXHIBIT No. 4.

WASHINGTON, *Oct.* 26, 1885.

The rent was paid the 17 of A(pril) to T. Sands; the deed received the 20 of April; the tax bill of $13.91 was paid May 1st and May 28. We loaned $12.50, with the promise that Mr. T. Sands would bring this money himself, but, failing to do so, will *will* Mr. Hazelton please make it right to us.

Amount due for rent	$23 36
Tax	13 91
Loaned	12 50
	49 77

Please send the papers; they are invaluable to us.

MRS. L. T. AVERY.

Mrs. Avery wishes you would oblige us just now if you can arrange with the bearer, Mr. R. S. Avery; perhaps some time may be of service to you. The money and papers are valuable to us just now.

L. T. AVERY.

EXHIBIT No. 5.

Agreement between Landlord and Tenant.

Memorandum of an agreement, between Robert S. Avery and Lorenzo D. Bumpus, all of the city of Washington, District of Columbia, whereby the said Robert S. Avery has agreed to let, and does hereby let, to the said Lorenzo D. Bumpus house No. 326 on A St. S. E. between Third and Fourth in said city, by the month commencing on the first day of Oct. A. D. 1887, at and for the monthly rent of twenty-five dollars, payable in full in advance, that is to say, on said first day of each and every month during which the said tenancy may continue, as rent in advance for the next ensuing month.

And the said Lorenzo B. Bumpus has agreed to take, and does hereby take and hold the said premises as a tenant by the month at the said rent, payable as aforesaid, and that he will pay the water rent and gas bills as they become due, and that he will not sublet or assign the said premises, or carry on any business therein, except that of dwelling without the written consent of the said lessor, or use the same for any disorderly or unlawful purpose.

Provided always, that if the said lessee shall fail to pay the said rent in full in advance as aforesaid, although there should have been no legal or formal demand for any rent whatever, or shall neglect to pay the water rent or gas bills at the time and on the day
14 when the same shall fall due and be payable as hereinbefore mentioned, or shall sublet or assign the said premises, or carry on any business therein except that of dwelling without the written consent as aforesaid, or shall use the same for any disorderly or unlawful purpose, or break either of the aforesaid covenants, then, and in either of said events, this lease, and all things herein contained, shall cease and determine, and shall operate as a notice to quit, the thirty days' notice to quit being hereby expressly waived. And the said lessor, his heirs and assigns, shall and may proceed to recover the possession of said premises, under and by virtue of a seven days' summons under the provisions of sections 684 and 685 of the Revised Statutes of the United States, relating to the District of Columbia, to regulate proceedings in cases between landlords and tenants; or by such legal process as may at the time be in operation in like case; but if no default occurs on the part of the said lessee to the aforesaid provisions referred to above, then he shall be entitled to not less than thirty days' notice to vacate the house and premises, and the owner or agent shall be entitled to the

same notice from the lessee, should he desire to vacate the aforesaid house and premises.

And it is further provided, that if under the provisions of this agreement a seven days' summons shall be served, and a compromise or settlement shall be made thereupon it shall not constitute a waiver of any covenant herein contained, or of the agreement itself. And the said lessee hereby agrees to deliver the house in the same order in which it was received, usual wear and tear, fire and storm excepted; and it is hereby provided and agreed that no waiver of one breach of any covenant herein shall be construed to be a waiver of the covenant itself, or of any subsequent breach thereof.

In testimony whereof we have hereunto set our hands this twentieth day of September, A. D. 1887.

ROBERT S. AVERY.
LORENZO D. BUMPUS.

Witness-:
WM. J. HARRIS.
JOHN R. HOGAN.

Answer of Julia N. Avery.

Filed June 10, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix, Defendants. } Equity. No. 16496.

The answer of Julia N. Avery, executrix, one of the defendants, to the bill of complaint of The Smithsonian Institution, plaintiffs.

To the honorable court:

This defendant, reserving unto herself all rights of exception to the said bill of complaint, for answer thereto saith:

15 1. This defendant is advised and believes that the statement of facts as alleged in paragraph 1 of said bill is true.

2. This defendant admits all the statements of facts as set forth in paragraph 2 of plaintiff's bill.

3. This defendant admits that the last will and testament of the said Robert S. Avery, deceased, was admitted to probate as alleged in paragraph 3 of said bill, and that she qualified as executrix as therein alleged.

4. This defendant admits that the bequests in the will of the said Robert S. Avery are as alleged in paragraph 4 of said bill, and she is advised and believes that the effect of the refusal of the legatees is as alleged in said paragraph, but for greater certainty craves to refer to the last will of said testator when the same shall be produced.

5. This defendant admits that the legatees mentioned in para-

graph 5 of said bill do dispute the last will of said testator so far as the same relates to the said house and lot of which she had notice from said legatees by letter of their attorney bearing date May 10th, 1895, and she is advised and believes that the effect of the contention of said legatees is as is alleged in paragraph 5 of said bill, but for greater certainty refers to the last will of said testator when the same shall be produced, and as to the other matters in said paragraph she has no knowledge save what is set forth therein.

6. This defendant says that she is informed and believes that the allegations contained in paragraph 6 of said bill are true saving and excepting so far as the same relate to the wife of the testator sharing in the "motives and purposes" of a plan of the testator fully set forth in a paper-writing in part quoted in said paragraph, of which the defendant has no knowledge beyond what is contained in said paragraph, and also saving and excepting the allegation that the wife of the testator was in more "vigorous health" than her husband, of which she has no knowledge beyond what is stated in said paragraph, and this defendant is advised that the plaintiffs have accepted the bequests under the will of said testator and are prepared to carry out his wishes as the same is alleged in said paragraph.

7. This defendant, disclaiming all knowledge of the motives, purposes, and beliefs of the testator and his said wife as stated in paragraph 7 of said bill and the deductions as therein alleged, is informed and believes the allegations of fact to be true as in said paragraph set forth, saving and excepting the statements that there was an express agreement by and between the testator and his wife in relation to the purchase of the house and lot in controversy, the terms of which were as alleged in said paragraph, and that the wife made certain declarations respecting the terms and conditions upon which the deed of said house and lot was executed in her name, and that she instructed her attorney to prepare her will embodying the disposition of the said house and lot as contained in said paragraph, and that her sudden death defeated such purpose on her part; all of which this defendant has no knowledge beyond what is contained in said paragraph.

16 And this defendant denies all and all manner of unlawful combination and confederacy wherewith she is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

JULIA N. AVERY, *Executrix.*

CHASE & MAISH,
Solicitors for Julia N. Avery, Executrix.

DISTRICT OF COLUMBIA, *City of Washington*, } *ss:*

Before me, the subscriber, a notary public in and for the city and county aforesaid, personally appeared Julia N. Avery, above named, who, being by me duly sworn according to law, deposes and says that she read the above and foregoing answer by her subscribed, and that she knows the contents thereof, and that the facts therein stated upon her personal knowledge are true and those stated upon information and belief she believes to be true.

Sworn and subscribed to before me this 8th day of June, A. D. 1895.

[SEAL.] O. M. BALL,
Notary Public.

Answer of the Defendants.

Filed July 15, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION, Plaintiff,
vs.
LEVI W. MEECH *et al.*, Defendants. } In Equity. No. —.

The joint and several answers of the defendants Levi W. Meech, Stephen T. Meech, William W. Meech, and Lucy M. Lord to the bill of complaint of the above-named plaintiff.

1, 2, & 3. They admit these paragraphs of said bill of complaint.

4. They admit that a legacy of one thousand dollars was bequeathed by the said Robert Stanton Avery to these defendants, but they say they have refused to receive the same upon the condition that they shall acquiesce in the devise by the said Avery of the property described in the seventh paragraph of said bill of complaint, and that the executrix has not paid the said legacy to
17 these defendants and refuses to pay the same except upon said condition. They further deny the validity of the condition attached to said legacy and say that they are entitled to receive the same discharged of any and all conditions whatsoever.

5. Answering so much of the 5th paragraph of the bill as is not already answered by the matters set forth in the preceding paragraph of this answer, they admit that the plaintiff is in possession of said part of lot 2, in square 787, described in the 7th paragraph of the bill, but they say said possession is wrongful and in violation of the rights of these defendants, who are the only heirs-at-law of Lydia T. Avery, who died seized and possessed in fee-simple of said real estate, and that these defendants, being such heirs-at-law, are alone entitled to the possession of said property as the lawful and rightful owners thereof, and they admit that they have made formal demand of the plaintiff for the possession thereof, as set forth in said paragraph.

6. Answering the 6th paragraph of the bill, they admit the exe-

cution of a will dated the 13th of September, 1882, by the said Robert S. Avery, but for greater certainty as to the contents thereof they prefer to refer to the paper itself when the same shall be produced. They, however, deny the relevancy or materiality thereof to the title of these defendants to said part of lot 2, in square 787, or that said testator had any interest, legal or equitable, in said real estate or possessed any power to devise the same to the complainant or any one else. They further deny the relevancy or materiality, as affecting the title of defendants to said property, of the matters and things set forth in said 6th paragraph concerning the life, habits, and desires of said testator and the correctness of the deductions and conclusions drawn therefrom by the plaintiff, and they claim the same benefit from this denial as if they had specially demurred thereto.

7. On information and belief they deny that the purchase-money for the real estate aforesaid was the money of said Robert S. Avery, but, even if the same were his, they say his payment of the same to the vendor, Timothy Sands, and his direction to said Sands to convey the said real estate in fee-simple to said Lydia T. Avery was in law and in equity an irrevocable gift and settlement of said real estate upon said Lydia by her said husband according to the purport and terms of said deed of conveyance. These defendants, however, upon information and belief aver that the title to said property was taken in the name of said Lydia, because at the time the said husband was justly indebted to her for monies used by him during their marriage and belonging to her, and that said conveyance was intended to be expressive of his obligation to her in that respect, so that practically and in legal effect the said purchase-money was really the money of said Lydia, owned by her at the time of her marriage or acquired by her subsequently in other modes than from her husband. They have no personal knowledge of the fact, as alleged in the bill, that at or about the time of said purchase there was an understanding or agreement, verbal or otherwise, between the said Lydia and her said husband
18 that the said real estate was to be held by said Lydia in any other way than upon the terms expressed in the said deed of conveyance to her, and, if said alleged fact be true and relevant, they demand strict proof thereof; and they further deny the relevancy or materiality of the allegations of the bill as to the declaration, intentions, or desires of her said husband in regard to said property. These defendants have no knowledge or information in respect of said declarations, intentions, or desires, and therefore can neither admit or deny the same, but if the same be relevant or material they demand strict proof thereof.

They admit that the plaintiff, on the 15th day of May, 1895, caused to be recorded among the land records of this District a declaration of ownership of said property, but they deny that said declaration can in any way affect the title of these defendants to said real estate except to place a cloud thereon, and they pray now, by way of cross-bill, that in any final decree which may be rendered in

this cause that said declaration may be adjudicated as null and voi
so far as it purports to affect said title.

And, having fully answered, they pray to be hence dismissed, t
gether with their respective costs.

LEVI W. MEECH.
STEPHEN T. MEECH.
WILLIAM W. MEECH.
LUCY M. LORD.

We do solemnly swear that we have read the foregoing answ
by us subscribed and know the contents thereof, and that the fac
therein stated upon our personal knowledge we know to be tru
and those stated upon information and belief we believe to be tru

LEVI W. MEECH.
STEPHEN T. MEECH.
WILLIAM W. MEECH.
LUCY M. LORD.

Sworn and subscribed before me by Levi W. Meech this 15th da
of June, 1895.

[SEAL.] C. LESLIE HOPKINS,
Notary Public for New London County, State of Connecticut.

Sworn and subscribed to before me by Stephen T. Meech thi
fifth day of July, 1895.

CHAS. B. CHAPMAN,
[SEAL.] *Notary Public for New London County,*
State of Connecticut.

Sworn and subscribed to before me by William W. Meech this 2
day of June, 1895.

[SEAL.] AUGUSTA J. WASHBURN,
Notary Public for State of New Jersey,
Co. Columbus, Borough of Vineland.

19 Sworn and subscribed to before me by Lucy M. Lord th
27 day of June, 1895.

OLIVER WALKER,
[SEAL.] *Notary Public for County of Hampshire, ss.*

Amendment to Bill.

Filed October 9, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTE, Plaintiff,
vs.
LEVI W. MEECH, STEPHEN T. MEECH, W. W. MEECH, and LUCY W. LORD, Defendants. } Equity. No. 1649

The plaintiffs amend their bill by adding to paragraph two
their prayers the following:

And that the defendants Levi W. Meech, Stephen T. Meech, W

W. Meech, and Lucy W. Lord, their heirs and assigns, be required to execute a deed of the said premises to the plaintiffs, and that any wife or husband having an interest be made party hereto and required to join in said deed.

FRANK W. HACKETT,
Sol. for Plaintiffs.

We consent to the above amendment.

FRANKLIN H. MACKEY,
Sol. for Def'ts.

CHASE & MAISH,
Att'ys for Julia N. Avery.

Replication.

Filed October 9, 1895.

Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} Eq. No. 16496.

The plaintiffs hereby join issue with the defendants.

By their att'y, FRANK W. HACKETT.

This replication may be filed *nunc pro tunc or* of within ten days after the filing of our respective answers.

FRANKLIN H. MACKEY,
For Def'ts Meech & Lord.

CHASE & MAISH,
For Def't Julia N. Avery.

20 *Appearance by F. H. Mackey for and Answer of Jeanette Meech, James Leander Lord, Susan Maria Meech, Made Additional Defendants by Stipulation.*

Filed October 14, 1895.

Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} Eq. No. 16496.

It is hereby agreed that the following persons be made parties defendant, and that the answer of Meech and Lord be taken as their respective answers, viz: *Jaennette Meech*, wife of Wm. W. Meech; *James Leander Lord*, husband of Lucy Maria Lord, and *Susan Maria Meech*, wife of Levi W. Meech; Stephen Tyler Meech being unmarried.

FRANKLIN H. MACKEY,
Solicitor for said Additional Parties.
FRANK W. HACKETT, *For Pl'ff.*
CHASE & MAISH,
Solicitors for Julia N. Avery.

Testimony for Complainant.

Filed October 25, 1895.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} In Equity. No. 16496.

Be it remembered that at an examination of witnesses begun and held on the 17th day of June, 1895, pursuant to agreement, and on the 18th day of June, 1895, agreeably to adjournment, personally appeared before me the within-named Lorenzo D. Bumpus, Alice L. Bumpus, Harmon M. Brush, Julia C. Bradley, John F. Cox, Ambrose H. Chase, George C. Hazelton, Leland P. Shidy, who, being produced as witnesses of lawful age for and on behalf of the complainant and being first duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the above-entitled cause, did depose and say as follows:

MONDAY, *June* 17, 1895—2 o'clock p. m.

Met pursuant to agreement.

Present: Frank W. Hackett, Esq., solicitor for the complainant; Messrs. Chase & Maish, solicitors for the defendant Julia N. Avery, executrix; Franklin H. Mackey, Esq., solicitor for the other defendants; also the examiner, and—

21 GEORGE C. HAZELTON, who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. Please state your name, occupation, and residence.

A. George C. Hazelton; I am a practising lawyer, and I reside in Washington city, D. C.

Q. Please look at this deed, purporting to be from Timothy Sands to Lydia Tyler Avery, to the execution of which you appear to be one of the witnesses, and state what you know about the execution of it.

A. Well, as to the mere execution of the deed, the deed was filled up by me; it is in my handwriting, except the printing. I saw Mr. Timothy Sands, the grantor named in the deed, execute it, and I witnessed it, as appears by my signature here.

Mr. MACKEY: We do not dispute the execution of the deed.

Q. Will you state what you recall as to the circumstances of that business transaction between Mr. Sands and Mr. Avery, the husband of the grantee, so far as you recollect?

Mr. MACKEY: I object to the question unless it is made more specific.

Mr. HACKETT: What took place at the time of the delivery of this deed and immediately preceding? I want the *res gestæ* as to the sale of this property.

Mr. MACKEY: I want to enter an objection to the question on the ground that it is irrelevant and immaterial. The deed speaks for itself.

A. Mr. Sands a little before and at the time this deed was made was a client of mine, at that time living in this city; he was a widower; he owned the property described in the deed and he wanted to sell it. The grantee with her husband occupied it at that time as rentors under Mr. Sands, and he, being rather decrepid and old, asked me to go up with him and see Mr. Avery and his wife. He got a carriage and I rode up with him to the Coast Survey building and saw Mr. Avery, and he went with us to the house and they looked it over and talked about the terms of the sale and purchase. They agreed practically upon the sum and arranged to meet at my office, in the Lenman building, on New York avenue, to consummate the transaction. They came there and I drew up the deed at the request of Mr. Sands and at the request of Avery. I will not say not his wife, for she may have expressed herself at the time as to something about it, but at their request I drew the deed up to her. The price and everything, of course, were agreed upon. Then a day or two after that they came back with the money, and Mr. Avery delivered the money
22 on my table and it was counted there and they took the deed and went away and Mr. Sands took the money. Mr. Wimer, I think, was in the building then, and we had him come into my office, as they were old people, and he brought his notarial seal and took the acknowledgment of Mr. Sands to the deed.

Q. What part, if any, did Mrs. Avery take in this business transaction?

Mr. MACKEY: Objected to as immaterial and irrelevant to the issues in this cause.

A. Well, there was no dispute between them as to what was to be done. It was directed that the deed be made to her, and there seemed to be an understanding between them that that was to be the way the deed should go.

Q. I do not refer to any arrangement between them at the time. I only inquire as to the part Mrs. Avery took in this business transaction.

A. She was present when we called at the house and she came to my office twice with him as husband and wife.

Q. Was anything said by her?

A. It has been a long time ago. I could not tell what was said, but he paid the money over, and there seemed to be an understanding between them that it was all right, and that is all I could tell.

Q. Please look at this paper-writing, purporting to be signed by Mrs. Avery, in which she speaks of "us" with reference to some unfinished business. Does that recall anything to your mind; and if so, what?

A. Well, my recollection is very indistinct in regard to this.

Mr. HACKETT: The paper which I show you is the original of Exhibit No. 4 to the bill of complaint in this cause.

Mr. MACKEY: Objected to on the ground that there is no connection whatever shown between the paper and the property in question. It is a paper written after the date of the deed and it is not identified in any way as having been written by Mrs. Avery.

Mr. HACKETT: I will meet that objection by proof hereafter.

Mr. MACKEY: And I make further objection that if said paper has any relation to this property the circumstances under which it is written are not shown.

WITNESS: This paper explains itself; it is in three items, rent, taxes, and money loaned. I think when the deed passed there was some little unfinished, left over. They did not have the papers with them that day to explain the matter fully, and this was a "drib" left over; for instance, here is an item of rent which related to the house they occupied, and then they probably paid some taxes for Mr. Sands and also loaned him some money. Before the sale of this house Mr. Sands was very hard up and was in a lawsuit with his son-in-law, and I take it that this paper relates to these little matters which were not closed up when the deed passed——

23 Mr. MACKEY (interposing): I desire to interrupt the witness long enough to enter an objection to this testimony on the ground that the witness is only undertaking to state his beliefs and opinion and speculations in regard to the paper, and does not so far undertake to testify upon his personal knowledge in regard to it; and I desire, if permitted, to request the witness to confine himself to his personal knowledge in regard to the paper.

Mr. HACKETT: You are permitted with great pleasure, Mr. Mackey, to make that request of the witness.

WITNESS: As I stated in the first place, my recollection as to the paper is indistinct. I would not swear positively as to it; I cannot swear positively as to it, because my recollection is not clear enough, but I am satisfied——

Q. (Interposing.) I do not ask what the paper means. I wish to know whether it possibly recalls to your mind any fact with reference to the doing of anything in connection with the property after the deed was delivered.

A. I will not say that I do not remember anything about it, because I have an indistinct recollection that there was some unfinished matter, and that I spoke to Mr. Sands about it.

Q. Who was it that saw you about it—Mrs. Avery?

A. She sent it by Mr. Avery, I suppose.

Q. I want the fact.

A. It would be impossible for me to swear that Mr. Avery came with that paper.

Q. Did you ever, as counsel for Mr. Sands, have any business transaction with Mr. Avery?

A. I have stated the facts just as they were. I saw them both together when we went to see about the house, and they both came to my office together in the making of the deed and the payment of the money.

Q. I wish to find out, without leading you, with whom the business was transacted—whether with Mrs. Avery or with both of them?

A. They were both present. Mr. Avery did most of the talking, and he handed me the money.

Cross-examination.

By Mr. MACKEY:

Q. I think you stated in your testimony-in-chief that they took the deed and went away. Who did you mean by "they"?

A. I mean that the deed was given to Mr. Avery. When I say "they" I mean that they seemed to be both agreed about the matter; they seemed to work together; they were acting in harmony.

Q. The deed was given to whom?

A. To him—Mr. Avery.

Q. And they went away together?

A. Yes, sir.

Q. You are not able to say who delivered to you this paper, of which Exhibit No 4. to the bill is a copy?

24 A. No. I will not swear that the paper even came into my hands.

GEO. C. HAZELTON.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

Mr. HACKETT: I here give in evidence this original deed, from Timothy Sands to Lydia Tyler Avery, dated April 20, 1885, and recorded April 21, 1885, in Liber No. 1118, at folio 278 *et seq.*, of the land records of the District of Columbia.

NOTE.—It is agreed that said deed is sufficiently proven, and the same is herewith filed in evidence and marked Exhibit A. H. No. 1.

ALBERT HARPER, *Examiner.*

See page No. 19.

LORENZO D. BUMPUS, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. State your name, age, occupation, and residence.

A. Lorenzo D. Bumpus; fifty-one years of age. I am at present

a watchman, and I reside at No. 131 California street northeast, in this city.

Q. You served in the Union army, I believe, during the war?

A. Yes, sir; as colonel of the 57th Pennsylvania.

Q. How long have you lived in this city?

A. Nine years last February.

Q. State whether or not you were a tenant of Robert S. Avery of house No. 326 A street southeast, in this city.

A. I was for five years or more.

Q. Will you examine the original lease, which is Exhibit No. 5 to the bill of complaint in this case and purporting to be signed Lorenzo D. Bumpus, and state whether that is a counterpart of the lease executed between you two gentlemen?

A. Yes, sir; and that is my signature.

Mr. HACKETT: I here give in evidence said lease as Exhibit No. 5 to the bill of complaint.

Mr. MACKEY: I waive production of the attesting witness, but I object to the paper as irrelevant, immaterial, and incompetent, it being a transaction *res inter alios*, Mrs. Avery herself not being a party to it and — being in no way brought to her knowledge.

Q. Please state what you did under this lease.

A. Lieut. D. P. Bradley took me and introduced me to Mr. and Mrs. Avery, and we came to terms as to the rental of the house. It was in very bad condition, and they allowed me five
25 dollars a month for the first year for putting the house in condition. I went to work and painted the house from cellar to garret.

Q. You say they allowed you, etc. Do I understand that you hired the house from Mr. and Mrs. Avery?

A. They were together. Mrs. Avery, perhaps, did the bulk of the talking, but Mr. Avery did the business; that is the way it was done, so far as that is concerned. She would say, "You keep still, Mr. Avery; I want to talk." That is the usual way it was when she was present.

Q. How long did you occupy the house?

A. I think five years.

Q. I have here a large number of receipts which you sent to me for the payment of the rent of this house over this entire period and purporting to be written and signed by Robert S. Avery. Take one of them haphazard, one dated December, 1887, as a sample, and tell me what was the fact with regard to your taking the receipts for rent, who wrote them and gave them to you.

A. They are written by and signed by Robert S. Avery.

Q. To whom did you pay the rent?

A. To Robert S. Avery.

Q. Was Mrs. Avery ever present?

A. Always; I do not know that I ever paid the rent when she was not present.

Q. Have you here all the receipts you can find?

A. Well, I did not look for receipts; I was looking for a copy of that lease when I found those receipts.

Q. You do recollect that no receipt was given except by Mr. Avery?

A. No receipt was given except by Mr. Avery.

Mr. HACKETT: I have thirty-nine of these receipts here, one of which, dated in December, 1887, I here give in evidence as follows:

WASHINGTON, D. C., 26 *Dec.*, 1887.

Received of Col. L. D. Bumpus rent for house No. 326 A St. southeast for the month of January, 1888.

ROBERT S. AVERY.

Mr. MACKEY: To the admission of which I object on the ground of its irrelevancy and being long after the date of the deed (Exhibit A. H. No. 1) and because it shows a transaction between other parties than Mrs. Avery.

Q. Was anything said in Mrs. Avery's presence, except what was said with regard to paying the rent, indicating who the owner of the property was?

Mr. MACKEY: Objected to. The witness should state what was said and not give his opinion with regard to the effect of what was said. The witness is asked whether anything was said indicating who the owner of the property w s. I should prefer that he state what was said and not what was indicated.

26 A. Mrs. Avery told me in my house and in her house and in his presence repeatedly that the property was bought with Mr. Avery's money; that she had to do the business for Mr. Avery, as he was not really competent to do it for himself; that she did the business for Mr. Avery and took the deed in her name.

Q. Did you have any conversation with Mrs. Avery with reference to where this property should go after her death?

A. Repeatedly.

Q. State what was said.

Mr. MACKEY: I object to any statement made by Mrs. Avery in regard to this property after the execution of the deed on the ground that an attempt to show title to property by the mere verbal statements of a party would be in contravention of the statute of frauds.

A. She told me repeatedly that Mr. Avery and she proposed to leave whatever they had at their death to the Smithsonian Institute to establish an "Avery fund" in the interest of science, and that whichever one died first the other one was to carry out the wishes of the two, that everything they had was to be left to the Smithsonian Institute.

Mr. MACKEY: Cross-examination waived.

LORENZO D. BUMPUS.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

ALICE L. BUMPUS, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. You are the wife of the last witness?
A. Yes, sir.
Q. How long have you been married?
A. Eighteen years.
Q. State whether you lived in a house on Capitol Hill rented of Robert S. Avery in 1887.
A. Yes, sir.
Q. How near was that to where Mr. and Mrs. Avery themselves lived?
A. The adjoining lot.
Q. How intimately were you acquainted with them during that period?
A. Well, I guess about as intimate as one could get; they very often spoke to us.
Q. Describe Mr. and Mrs. Avery as you would in telling anybody about them.
A. I am afraid that is the hardest thing in the world to do,
27 because they were so peculiar and eccentric. Mr. Avery was not so peculiar. Mr. Avery I do not think had any bad habits; he attended to his books at home, and she seemed to attend to his business outside as much as she could.
Q. Which was the older of the two?
A. Mr. Avery, considerably, I think.
Q. Were you present at any time when your husband paid the rent?
A. Yes, sir.
Q. Who transacted the business—received the rent and gave the receipts?
A. Mr. Avery always took the money and handed the receipts.
Q. How intimate were you with Mrs. Avery with regard to her putting confidence in you and telling you of her affairs?
A. She would just come over and tell me—well, in fact, she would start off and tell about her property over on B street, and that she owned that and owned this place, and that it was Mr. Avery who bought both places, and that after a little she was going to tear down and build a new house; she would tell what she was going to do, and that he was not able to do so and so because his health would not permit.
Q. I understand she said that she owned the property on B street?
A. Yes, sir; she said so, but I do not think she had anything to do with it in her life.
Q. Did she ever say anything to you about how the money was obtained with which that property was bought where you lived?

A. Well, she used to say that it was Mr. Avery's money; that he had earned the money. and she claimed the property he hadbought.

Q. How did she say he had earned it?

A. Well, I guess in the Coast Survey. I believe that was where he worked the greater part of the time.

Q. I meant with reference to the size or amount of the money.

A. I could not say how he got the money.

Q. You say she said that she claimed the property. What was her language?

A. She said that Mr. Avery had bought the property and told her she could have it, and she always said to me that it was her property.

Q. The property where you lived?

A. Yes, sir; and she said the property on B street was hers, too, but I guessed not.

Q. Did she say anything about what was to become of that property after they died?

Mr. MACKEY: I object to this question for the same reasons given to a similar question propounded to the previous witness.

A. Well, she said over to our house once that when they were through with it they wished it to go to the Smithsonian Institute.

Mr. MACKEY: Cross-examination waived.

ALICE L. BUMPUS.

28 Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

JOHN F. COX, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. State your name, occupation, and residence.

A. John F. Cox; attorney-at-law, and I reside at No. 3319 O street northwest, in Washington, D. C.

Q. Did you know the late Robert S. Avery, and in what way did you happen to know him?

A. I had occasion to visit Mr. Avery in the latter part of 1889. At the request of Mr. Allen C. Clark, of this city, I called upon Mr. Avery to see him about the sale of some lots in square 986, and after making two or three visits we came to an agreement and I purchased the lots for Mr. Clark.

Q. Did you know Mrs. Avery?

A. Yes; I was introduced to Mrs. Avery. I became acquainted with her through the visits I made to Mr. Avery.

Q. Where did you see her?

A. At her house. I always saw her in company with Mr. Avery, at No. 320 A street southeast, in this city.

Q. Will you describe as well as you can the age and appearance and general conduct of those two persons?

Mr. MACKEY: Objected to as irrelevant.

A. Well, I was struck with their appearance; they were very odd looking in appearance. Mr. Avery was a gentleman with full beard and long hair and looked to be a literary man, and from my conversation with them I found that they had both lived a very retired life, and that they were very fond of literary matters. In my early acquaintance with him he spoke of his property and his intention to leave it all to the Smithsonian Institute.

Mr. MACKEY: I object to so much of the answer as undertakes to state what Mr. Avery said.

Q. Was Mrs. Avery present at the time?

A. She was present at the time, and he gave me rather a full history of the pieces of property that he had acquired through the money he had received in serving the Government in the Coast Survey. He said there was one piece of property—the one next door, which is in question in this suit, I believe—that he had permitted Mrs. Avery to take in her own name, and Mrs. Avery said she had taken it in her name; that it was their intention at their death to let the survivor enjoy the property which Mr. Avery had and she had during his or her life and at his or her death it was to go to the Smithsonian Institute. She seemed to be impressed with the
29 idea that she was going to outlive him, and she informed me that he had made a will and requested me to look at the will with a view of making a new one. I do not recall to mind now the particular objection that she had to the old one, but it may have been in the number of witnesses I saw attached to the old will. I do not know whether that was the case or not. However, he said it would be more satisfactory to him to have a new will made, and it was her intention also to make a will, but she was under the belief that she was to outlive him, and she had me attend to his will first. In his presence she entered into the conversation of making a will and requested that his will be made first. Some months, probably, elapsed between that time and my bringing to him the will or copy of the will which I supposed he would sign, and he was struck with the copy that I had prepared, and at that time, not feeling very well—well enough to go out—he asked me if that could not answer for the will and he go to the justice's office in the neighborhood and execute that paper as his will. I told him there was no objection to it——

Mr. MACKEY (interposing): I object to any statement of conversations with Mr. Avery, and notify counsel that I will move the court to strike it out on the ground of irrelevancy.

WITNESS: We afterwards repaired to the justice's office and he waited there while I went to the Coast Survey office and asked the other witness, Mr. Shidy, to come around, which he did, and the will was executed. The will that was executed was typewritten

and only intended to be a copy to be submitted to him to see if it was satisfactory to him.

Q. Go on and state any other conversation, particularly with reference to Mrs. Avery; any statement she made about this property or the disposition of it.

A. Mrs. Avery always intended to have me make her will.

Q. Did she give you any directions about it?

A. The same language of his will was to be embodied in hers. She regarded this property that she held only in trust, as it were. She always spoke about it as property which had been bought with the money that he had saved, and she always gave him great amount of praise for the economy which he had exercised in the early history of his life. I had frequent talks with them both. I asked Mr. Avery if he thought that at any time after his death his will would be contested. I even went so far as to say that it could be arranged in a different manner than by will if he saw fit to do so. He informed me that he did not fear any action from any member of his own family, and that in view of the fact that Mrs. Avery had given one thousand dollars to her mother out of the assets of the Norwich savings bank, I think, was the name of it, he did not suppose any action would be taken upon their part. This was said in Mrs. Avery's presence.

Mr. MACKEY: I object to so much of the answer as under-
30 takes to testify to what Mrs. Avery regarded about this property, and also to any conversation had with Mr. Avery and the statements made by him with regard to this property or with regard to any will that he proposed to make or any statements by Mrs. Avery in regard to any will she proposed to make or to be made, and I notify counsel that I will move the court to strike it out.

Q. What did you do with reference to preparing some affidavits after the death of Mrs. Avery in respect to the ownership of this property in question?

Mr. MACKEY: Objected to as incompetent, irrelevant, and immaterial.

A. Mr. Avery told me that there were some friends of Mrs. Avery who were acquainted with the disposition that she intended to make of the property by will—that is, they knew of her intention to make a will and to provide that the property should follow the same course as the property he had embodied in his own will, and he gave me the names of these people and asked me to go and converse with them and from such conversations to draw up affidavits which would cover the point, which I did.

Q. How many did you prepare?

A. I think there were five.

Q. You handed them over to the Smithsonian Institute after my application?

A. Yes.

Mr. MACKEY: Now, again, I object to the answer on the same ground as stated in my previous objection to other conversations had with Mr. Avery after the death of Mrs. Avery, and also because these affidavits are not produced and contents not known.

Q. Will you examine what purports to be an affidavit of Mr. Avery himself and state in whose handwriting it is and what you know about it?

A. It is my handwriting.

Mr. HACKETT: Please read that affidavit, so that it may be incorporated in evidence here upon the record.

Mr. MACKEY: I object to the reading of the affidavit or any portion of it upon the record as being irrelevant and incompetent.

WITNESS: This affidavit reads as follows:

"Robert Stanton Avery, residing at No. 320 A street southeast, in the city of Washington, District of Columbia, being duly sworn according to law, deposes and says that on the twentieth day of April, A. D. 1885, he purchased from Timothy Sands, of said city and District, part of lot two (2) in square numbered seven hundred and eighty-seven (787), situated in said city, and more particularly described in deed recorded in Liber No. 1118, at folio 278 *et seq.*, one of the land records of the District of Columbia, being premises No. 326 A street southeast; that at the time of said purchase he was not in good health, and his wife, Lydia Tyler Avery, being of the
31 opinion that she would outlive him he permitted said property to be transferred to her upon the then expressed condition that she was to make a will in his favor in the event of his surviving her, as he had already done in her favor in the event of her surviving him, the mutual understanding being that the combined property was to be left to the survivor during life and then to be disposed of by will for scientific or educational purposes, as had been talked over and agreed upon by them in conversations between them, this disposition of all their estate being so made in consequence of their married life not having been blessed with children. Affiant further states that the entire consideration money paid over for said property was saved exclusively from his earnings; that his wife, Lydia Tyler Avery, departed this life on the eighteenth (18) day of November, A. D. 1890, without issue and without a will, although he, at her request, during her last illness had prepared one embodying her wishes as herein expressed, but at the time of presenting it to her for execution she was too far gone to execute the same, and never thereafter rallied sufficiently to perform any such act.

ROBERT STANTON AVERY.

Subscribed and sworn to before me this fifteenth day of November, A. D. 1892.

ROBERT V. HUGHES,

[SEAL.] *Notary Public.*"

Q. Do you recollect the names of any other witnesses whose affidavits you took?

A. Mrs. Lieut. Bradley and Col. Bumpus and his wife and Mrs. Nute.

Q. What was the object of Mr. Avery in having these affidavits taken, if he stated?

A. Mr. Avery at first talked of having me get quitclaims from the heirs of Mrs. Avery for the purpose of having them on record, and in the absence of that he suggested that these affidavits be made.

(NOTE.—It is understood that Mr. Mackey, for the parties whom he represents in this case, objects to all testimony which undertakes to give evidence of statements made by Mr. Avery or conversations had by him with any persons not parties to this suit, and that this objection need not be repeated.)

Q. What were you to do with these affidavits?

A. They were to be handed over to the officers of the Smithsonian Institute.

Q. Was anything said by you with reference to putting them on record?

A. Yes; they were to be recorded at first, but afterwards it was ascertained that they could not be recorded.

Q. How soon was this after Mrs. Avery's death that these affidavits were obtained?

32 A. She had not been dead long. It was not very long after her death.

Q. Now, Mr. Cox, you may have testified on this point; if so, it escaped my notice. I want to know particularly whether Mrs. Avery ever requested you to prepare a will for her or ever talked with you with reference to sending for you for that purpose.

Mr. MACKEY: Objected to as incompetent and irrelevant.

A. Mrs. Avery, during the times that I called and talked about the property, made known to me the fact that she wished to make her will some time after my first visit, and she at that time gave me a history of how she obtained this property and the disposition that was to be made of it. She said that her husband had permitted her to take the property in her own name, and that she wished to make a will which would follow out his intentions as to his own property, and the reason I did not make her will was because frequently I would suggest it to her, and she would say, "Well, after you make Mr. Avery's will and he executes his, why then I can make mine; but he is going to die, I know, before I will. He is so sick." I do not mean to say she would make this statement in his presence. She would follow me to the door and go out as far as the gate with me, and urge upon me to attend to Mr. Avery's will, and then do the same thing for her.

Q. State whether this purpose of hers to give this property to the Smithsonian Institute had any reference to an agreement when the property was put in her name.

Mr. MACKEY: Objected to as calling for an opinion of law and for the opinion of the witness.

A. That question I would not be able to answer. Let me see my affidavit.

Mr. HACKETT (handing to witness his affidavit): Here it is.

Mr. MACKEY: I want to object to witness reading his affidavit and testifying afterwards from a result of that reading. I wish to know from the witness whether he has not recollection sufficient to enable him to answer that question without reading his affidavit.

WITNESS: I think I have.

Mr. MACKEY: Then I submit that the witness should answer the question without reading the affidavit.

Q. (Repeated.) State whether this purpose of hers to give this property to the Smithsonian Institute had any reference to an agreement when the property was put in her name.

A. From her statements I concluded that it was mutually understood that the property should follow that direction.

Mr. MACKEY: I object to the witness stating his conclusion.

Q. You say mutually. You mean when?

A. I do not recall that she ever stated to me that there was an arrangement or an agreement conditional in her taking the
33 property, but I understood that she took the property knowing that it was to go in the same direction with the other property, even if Mr. Avery had changed his will for some other literary purposes or for the benefit of the arts and sciences.

Mr. HACKETT: Now, I think you can read that affidavit of yours if you wish to refresh your mind, and I wish to state here that I have had no opportunity to confer with the witness before putting him on the stand.

Mr. MACKEY: I submit that the affidavit cannot be read unless I have an opportunity to read it to cross-examine him in regard to it.

Q. After reading that affidavit is your memory refreshed as to these circumstances about which you have been testifying to any extent? If so, what?

A. I find that my testimony agrees with my affidavit, and that there is nothing new in the affidavit which I could further testify to to enlighten the subject.

Cross-examination.

By Mr. MACKEY:

Q. At the time that you had these conversations with Mrs. Avery and at the time that she made these statements to you, what business or professional relation did you have with her—that is to say, I want to know whether you were her professional adviser in regard to drawing her will and in regard to the property?

A. I was her attorney, acting for her in that matter.

Mr. MACKEY: It now appearing that these statements were made by Mrs. Avery to Mr. Cox by reason of his professional relation to her, I object to the competency of the testimony in this regard and notify counsel that I will move the court to disregard it and exclude it from the record.

By Mr. HACKETT:

Q. I understand you to say that these statements of Mrs. Avery were made in the presence of Mr. Avery when they two were together.

A. Yes, sir.

By Mr. MACKEY:

Q. You were also counsel, I believe, for Mr. Avery?

A. I was called in to perform this matter of business for them both.

Q. In your professional capacity as attorney?

A. Yes, sir.

Q. Are you able to state, Mr. Cox, of your own knowledge that you know any condition upon which the title to this property was placed in the name of Mrs. Avery, any precedent condition?

A. Only except as she disclosed by her statement to me.

34 NOTE.—The witness having stated, after examining the exhibit to the bill of complaint which purports to be a copy of the codicil of Mr. Avery executed the 20th of December, 1892, that he did sign it as a witness, it is agreed between counsel that upon the production of the original and the proof of it by another witness Mr. Cox need not be recalled as to this point.

WITNESS: My recollection is that I wrote the original of the codicil.

JOHN F. COX.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

AMBROSE H. CHASE, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. Please state your name, occupation, and residence.

A. Ambrose H. Chase; I am a newspaper man and an attorney-at-law, and I reside at No. 2830 14th street, northwest, in this city.

Q. Have you acted as attorney for the executrix of Mr. Avery in this matter?

A. I have.

Q. In that capacity have you had occasion to be frequently at the house where the late Robert S. Avery lived and died?

A. I have.

Q. Whether or not you made search through the house for any papers of Mr. and Mrs. Avery with reference particularly to the disputed ownership of this property?

A. I made careful examination of all the papers and read every paper I could find.

Q. Did you hunt for any check book or bank books?

A. I did.

Q. Did you find any?

A. I did not.

Q. Have you made any inquiry at the various banks of Washington to ascertain whether Mr. Avery had a bank account?

A. I have at several.

Q. What was the result?

A. I did not succeed in finding that he kept any bank account; I mean prior to 1885. I did find an old bank account at the National Capital bank, but it was since 1885.

Q. I hand you this paper, which is the original of Exhibit No. 4 to the bill of complaint, and ask you to state whether you found that.

A. Yes; I found this among the papers.

Q. And whether that was the only paper having relation to this matter you found.

35 A. Yes; that is the only paper.

Q. Do you know in whose handwriting it is?

A. I do not.

Q. I also submit to you a paper purporting to be written by Robert S. Avery and headed "Expenses of my wife's burial," and dated December, 1890, and ask you whether that is a paper you found.

A. Yes; that is a paper I found.

Q. Did you know Levi W. Meech, one of the defendants?

A. I did not.

Q. Have you ever known him?

A. I have never known him.

Q. You have had no conversation, then, with any of the defendants about this case?

A. None. I never saw any of them, to my knowledge.

Cross-examination.

By Mr. MACKEY:

Q. How long after Mr. Avery's death was it that you visited the house to make an examination of these papers?

A. It was done recently—about a month ago, I should think. I do not remember, but two or three weeks ago.

Q. In whose custody did you find the papers?

A. In the custody of the executrix, his niece.

Q. Do you know how long they had been in her custody?

A. I do not know. I know that she had general charge of the things there and lived in the house.

Q. You think she had charge of them because she lived in the house.

A. Yes.

Q. Do you know who had charge of them before she had?

A. Her uncle, Mr. Avery.

Q. Do you know that?

A. No; I do not know personally.

Q. In what condition did you find these papers?

A. There was a large number of papers up there and I examined them all carefully. I do not remember just whether that paper was in an envelope or whether it was done up in a bundle. Some were done up in a bundle with rubber bands, some with strings, and some were loose.

Q. As matter of fact, then, of your own knowledge, you do not know in whose custody these papers have been since the death of Mrs. Avery?

A. No; I do not know.

Q. The first you ever saw of them was about a month or so ago?

A. Yes.

36 Redirect.

By Mr. HACKETT:

Q. Was Miss Avery living in her uncle's house at the time of his death?

A. She was.

Q. And she has been living there ever since?

A. Yes.

Q. Anybody else living there?

A. No.

Recross.

By Mr. MACKEY:

Q. Do you know that of your own knowledge?

A. Yes. Some of these papers were in a trunk and some in a desk downstairs, and Miss Avery had the keys, and she produced the keys there and I was able to search for them in that way. Nobody else had access to them.

Q. Was this search made by you since the filing of this bill or before?

A. I think before. I was looking for some securities of the Northern Pacific Railroad Company which we could not account for, and the finding of these papers was an incidental thing.

Q. What banks did you visit to ascertain whether Mr. Avery had a bank account?

A. The National Bank of the Republic, Lewis Johnson & Co.'s bank, the Second National bank, and the Bank of Washington.

Q. You did not visit any more?

A. No.

A. H. CHASE.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

HARMON M. BRUSH, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. You are a clerk in the Indian Office, are you not?

A. Yes.

Q. Were you formerly owner of property on Capitol Hill that was sold to Timothy Sands and by him sold to Robert S. Avery?

A. Yes; I sold to Sands.

Q. Do you recollect the circumstance that $600 was left due of the mortgage on that property at the time that Mr. Avery bought it?

A. Yes.

Q. Will you please examine this note and, after examin-
37 ing it, say whether, to the best of your recollection, that note was paid, when, and who paid it?

A. I cannot tell just how it was paid; there is my mark on there paid, but I cannot tell you exactly. I know I called on Mr. Avery once at the house in relation to it and then he called on me or met me at the Second National bank, but whether he paid me at the Second National bank or on the evening that I called at the house I cannot tell.

Q. In what form was the money paid?

A. In bills. That is all I know about it—that is, I know that he paid me.

Q. Did you have any dealings with Mrs. Avery about it?

A. No; none at all. I think she was present the evening I called at the house, but she was not a fit person, according to my idea, to do any business with; she was not responsible, and whatever there was of it was done with Mr. Avery. As far as I can recollect, I will not say positively, I think I called there, whether at his instance or not I cannot tell, but my recollection is that he met me at the Second National bank, where I do my business, and he paid me the money on the note and I marked it cancelled; possibly he might have paid me the night I was there at the house, but I think not. I think he met me at the Second National bank at a specified time. I never did any business with her. I do not think she was at all responsible for anything at that time.

Mr. HACKETT: I here give the note in evidence.

(NOTE.—And the same is herewith filed in evidence and marked Exhibit A. H. No. 2.)

EXHIBIT A. H. No. 2.

Filed October 25, 1895.

$600.00. WASHINGTON, D. C., *May 22nd*, 1884.

Secured by deed of trust.

On January 1st, 1886, [after date]* I promise to pay to the order of Harmon M. Brush the sum of six hundred ($600.00) $\frac{00}{100}$ dollars at the bank of Riggs and Co., Washington, D. C., value received, with interest at 6% per annum until paid, interest payable annually.

No. —. Due —. TIMOTHY SANDS.

J. D. CROISSARTT,
Witness to Signature of Timothy Sands.

(Written across the face in red ink:) Paid.

Endorsements: Received May 26, 1885, thirty-six dollars ($36), one year's interest on within. May 26, '85. Pay to the order of Lydia Tyler Avery. Harmon M. Brush. June 11, 1885.
38 June 11, 1885, I paid Harmon M. Brush $2.75, his expenses for obtaining the release from the trustees, and $1.25 as recorder of the same.

Cross-examination.

By Mr. MACKEY:

Q. Do you know anything of the source from which Mr. Avery got the money to pay this note?

A. No. All I know is that he paid the money.

Q. I notice on this note the endorsement, "Pay to the order of Lydia Tyler Avery. Harmon M. Brush. June 11, 1885." Is that your signature?

A. Yes; and that is my writing, but I do not remember anything about that.

Q. You do not remember at whose instance or request you did that?

A. No; I did not know it was there. That is my writing also at the top.

Q. Was that endorsement which I have read put on there at the time of the payment?

A. I cannot say about that. No; I do not think so. I do not remember about it being put there, but it is my signature and writing.

Q. The date, June 11, 1885, is in your handwriting, I believe?

A. Yes; I do not remember a thing about that, and I have no recollection as to when the note was paid.

[* Erased in copy.]

Redirect.

By Mr. HACKETT:

Q. Have you any means of knowing the particular time when you got this money?

A. No.

Q. You do not remember whether it was in October, 1885, or not?

A. I do not know. I have no recollection of it.

Q. The note was due the first of January, 1886?

A. I know the note was paid before it was due.

Q. You cannot tell how long before?

A. No.

Q. Do you keep a bank account?

A. Yes.

Q. Could you turn to it and find out when this note was paid?

A. Well, it is possible that I could.

Q. It was with reference to that endorsement—whether it was in June, 1885, that it was paid or later?

A. I cannot tell without going back and looking up my old books. I do not know whether I have them now or not. That is quite a long while.

39 Q. Are both endorsements in your handwriting—the one at the top and the other?

A. Yes; I think so; yes; that is evidently my handwriting—May 26, 1885.

Q. As I understand, all you can remember now is that when it was paid it was paid by Mr. Avery?

A. Yes; I think it was paid by him.

Recross.

By Mr. MACKEY:

Q. What do you mean by Mrs. Avery not being fit to do business with?

A. I lived near her for some time, and I certainly did then consider her a person off her balance and not capable of doing business. I always looked upon her as such a person, and I never had occasion to do business with her.

Q. Did you consider her as not being mentally balanced?

A. Yes; I always looked upon her as being half crazy.

Q. You thought she was mentally unbalanced and all that?

A. I did, and I was in a position to know.

Q. Did you have any conversation with her?

A. Lots of times. She would get you in a corner and talk you to death if you did not start to run—random talk.

Q. So as to make you believe she was off her mental balance?

A. Yes. I am no physician, but I should consider such a person not responsible for half she said or did, and I looked upon her that way. That is just my general opinion. I never would undertake to do any business with her, because I did not think she was capa-

ble of doing it, and that is why I know I had nothing to do with her in this matter.

Q. Then when you endorsed this note to her——

A. (Interposing.) I do not remember that.

Q. From your opinion of her mental capacity would you have endorsed that note to her at her request or that of her husband?

A. It was done at her husband's request, I have no doubt.

Q. All your business was done with him?

A. Yes.

Q. And therefore, if the endorsement was made, you say it was at his request?

A. Yes; although I have no recollection about that endorsement; I do not remember doing it, but that is my handwriting. That is all I know about it. I cannot recollect it at all; at whose instance I did it, whether at the instance of Mr. Avery or at her instance, I do not remember.

Q. You do not remember her asking you to make that endorsement?

A. I do not.

Mr. HACKETT: I here give notice that I shall move the court to strike from the record so much of the testimony of this wit-
40 ness as refers to his opinion of Mrs. Avery's competency to transact business.

HARMON M. BRUSH.

Subscribed and sworn to before me this 17th day of June, 1895.

ALBERT HARPER, *Examiner.*

Adjourned to—

TUESDAY *June* 18, 1895—3.30 o'clock p. m.

Met pursuant to adjournment.

Present: Frank W. Hackett, Esq., solicitor for the complainant; Messrs. Chase & Maish, solicitors for the defendant Julia N. Avery, executrix; Franklin H. Mackey, Esq., solicitor for the other defendants; also the examiner, and—

LELAND P. SHIDY, who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. State your name, occupation, age, and residence.

A. Leland P. Shidy; 44 years of age; computer in the Coast Survey office, and I reside at No. 1617 Marion street northwest, in this city.

Q. How long have you been in the Coast Survey office?

A. I have been in the same service there since May, 1873.

Q. What is your present position there?

A. I am acting chief of the Tidal division. It is the position which Mr. Avery held. He was actually chief, but I am not; I am

acting chief at present, but my position on the pay-roll is that of computer.

Q. Were you in the employ of the Coast Survey at the time that Mr. Robert S. Avery was there?

A. O, yes; for a number of years.

Q. How intimate did you know him?

A. About as intimate as one man could know another. I was associated with him every day in my work for a dozen years and saw him very frequently at his home and frequently took meals at his house upon his invitation, and oftentimes spent a week and sometimes as much as three or four weeks at a time in his house. Usually, however, at such times he would be away himself, and I would stay there to keep his wife company, so that she would not be lonely while he was gone.

Q. Give us some idea of the character of the work which Mr. Avery was engaged at in the Coast Survey office.

A. It was work which required considerable knowledge of mathematics and a methodical and careful person to discharge it properly, because if a man did not have knowledge of mathematics and was not methodical he would soon get badly mixed up, the number of stations he having to deal with being so great as to be unable to find anything at all.

41 Q. What was Mr. Avery's success in that office?

A. He was, I think, very successful. He did more than any of his predecessors and got the work into better shape, so that it could be handled with greater ease than it had been at any preceding time. He not only carried on the work of his predecessors, but improved the work in many important details. He devised a number of different ways of predicting the tides—that is, what what would be the tides at future times—for the benefit of mariners. He devised important ways of discussing observations in order to get at the best results. He also classified the results of those which had been made from the time the Coast Survey service began until he was in charge and consolidated the results himself from that knowledge into a single register including, perhaps, a thousand stations where tides had been observed.

Q. State how well you knew Mrs. Avery.

A. I met Mrs. Avery first in about June, 1873, and from that time until her death I saw her very frequently and was in their house sometimes for a week at the time and sometimes a month at a stretch; of course, out of office hours. She would furnish me with room and board and I would be with her and engage in conversation in the evenings and at table times, so that I had frequent opportunities of seeing the woman and knowing her very well.

Q. Do you recollect the circumstance of the purchase by Mr. Avery of the property No. 326 A street southeast, in this city?

A. Yes; I do. I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all, and after that was decided they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the

deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so and had the deed made out in her name.

Q. Did Mrs. Avery state any reason why the deed should be made out in her name?

A. Yes. She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name.

Q. State what final disposition, if any, was agreed upon by these two persons in your presence.

Mr. MACKEY: I object to any statement by witness as to what the agreement was between them because it was merged in the deed.

A. It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute.

Q. I understand that this conversation which you are now testifying to took place at or about the time of the actual purchase and the making of the deed. Was any reference made to the
42 ownership of this property that you can now recollect subsequent to the date when it was bought?

A. After that they referred to it in a number of interviews while I was present, and every time they alluded to it with the same understanding—that is, that the property was to be hers during her lifetime and was to be disposed of at her death, in accordance with the will of Mr. Avery, with the rest of his property.

Q. Do you know of any reason that was stated by either Mr. Avery in Mrs. Avery's presence or by Mrs. Avery alone why that property should go to the Smithsonian Institute and not elsewhere?

Mr. MACKEY: To the answer to the previous question I wish to enter an objection upon the same ground, that the statements of the parties cannot be received to contradict the express language of the deed, and I object to this question for the same reason and also as leading.

Mr. HACKETT: Then I will change that question.

Q. What was said, if anything, by Mr. Avery in Mrs. Avery's presence or said by Mrs. Avery alone why the property should go to the Smithsonian Institute and not elsewhere?

Mr. MACKEY: Same objection.

A. The reasons assigned seemed to be that the property was bought and paid for by Mr. Avery's money, and he was anxious that the fund he should leave for the benefit of science should be large as possible so as to be as beneficial as possible for the purposes for which he left it, and he did not contemplate that it should be diminished by the amount of money invested in this property in any way.

Q. Do you know as matter of fact how Mr. Avery's money was obtained?

Mr. MACKEY: I object to the witness giving his opinion.

A. I think the most of it was obtained by rigid economy in the saving of his salary under the Government. He occupied his position for thirty-two years, and while his salary was not a very large one, he received two thousand dollars a good portion of the time, and he lived very economically indeed, both himself and his wife, and the money he received in that way he invested in various investments, and then he was able to accumulate from those sources. He was very poor when he came to Washington.

Q. Had he any children?

A. No.

Q. Whether Mrs. Avery ever said anything to you in the line of carrying out this agreement entered into at the time this property was bought?

Mr. MACKEY: Objected to as leading and incompetent, as calling for statements, made after the date of the deed, and on the ground that it is incompetent to contradict the express terms of the deed by such oral testimony.

43 A. Yes; she spoke of doing so on various occasions, and invariably said that she had a reluctance to making a will, but hoped to do so before she got to be incompetent to make one; that there was no hurry for it; that she was in comparatively good health, able to help herself in every way, and that it being very unpleasant for her to make one she would delay it until a convenient time or until it became necessary to make one.

Q. How much older was Mr. Avery than his wife?

A. I think about twenty years, or nearly so. He was considerably older—fifteen or twenty years older, you might say.

Q. Do you know how old he was when he died?

A. He was born May 1st, 1808, and he died, I think, in 1894; I do not remember just when, but in the fall of 1894, I think; so that he was in his 87th year.

Q. Were you ever called upon to witness a will or codicil of Mr. Avery?

A. Yes; both.

Q. I hand you what purports to be a will of Mr. Avery, dated September 13, 1882, in his own handwriting apparently, and witnessed by James A. Tait, Morgan F. Mount, and Leland P. Shidy, and ask if that is your signature.

A. Yes.

Q. Do you recollect the fact that you did attest that will with those gentlemen?

A. Yes.

Q. What do you know of the other two witnesses?

A. Both of those gentlemen are dead.

Q. Next a codicil written by Mr. Avery, dated May 19, 1893, and

witnessed by Leon L. Frederich, Leland P. Shidy, and Joseph M. Johannes. Is that your signature?

A. Yes.

(NOTE.—Mr. Mackey here admits upon the record that said codicil was duly executed.)

Q. Now, a typewritten codicil dated December 20, 1892, and witnessed by James A. Tait, yourself, and John F. Cox. Do you recognize that as your signature and make the same statement as to its attestation?

A. Yes.

(NOTE.—Mr. Mackey here admits upon the record that said codicil was duly executed, and it is agreed between counsel that the exhibit attached to the bill is a copy of said will and codicils, and that the original papers can be produced at the request of counsel at the hearing of this cause.)

Mr. MACKEY: While I agree that a copy may be substituted for the original of this paper, I object to the original paper as incompetent and irrelevant.

Q. I show you a paper purporting to be in the handwriting of Mrs. Lydia T. Avery. Did you ever see her write?

A. Yes.

44 Q. Are you familiar with her handwriting?

A. Yes.

Q. Is that paper in her handwriting?

A. Yes.

Q. The whole of the paper?

A. Yes; as near as I can judge. I do not profess to be an expert in handwriting, but I think that is in her handwriting.

Mr. HACKETT: I here give that paper in evidence.

Mr. MACKEY: To the admission of which I object as irrelevant and incompetent and not sufficiently proven.

(NOTE.—And the same is herewith filed in evidence and marked Exhibit A. H. No. 3.)

EXHIBIT A. H. No. 3.

Filed October 25, 1895.

WASHINGTON, *Oct.* 26, 1885.

The rent was paid the 17 of A. to T. Sands; the deed received the 20 of April; the tax bill of $13.91 was paid May 1st and May 28. We loaned $12.50 with the promise that Mr. T. Sands would bring this money himself, but, failing to do *do* so, will *will* Mr. Hazelton please make it right to us.

Amount due for rent	$23 36
" " tax	13 91
" " loaned	12 50
	49 77

Please send the papers. They are invaluable to us.

MRS. L. T. AVERY.

Mrs. Avery wishes you would oblige us just now, if you can arrange with the bearer, Mr. R. S. Avery. Perhaps some time we may be of service to you. The money and papers are valuable to us just now.

L. T. AVERY.

Q. After Mrs. Avery's death were you applied to by Mr. Avery to make an affidavit with reference to the ownership of this property?

A. Yes.

Cross-examination.

By Mr. MACKEY:

Q. State whether or not Mr. and Mrs. Avery lived in this property at the time of its purchase.

A. No; they lived next door to this property—that is, next door in a general way, there being a vacant lot between them, but it was what they regarded next door. It was the adjoining house, with a vacant lot between.

45 Q. How long after the purchase of this property was it before they moved into it?

A. They never lived in this house.

Q. But they always lived next door to it?

A. Yes; from the time they were married. He built the house before they were married and she came down to occupy it.

Q. Did you know Mr. Avery before his marriage?

A. No; I only got acquainted with him after his marriage; but he told me, of course, of the history of his life, and that is the way I know about his marriage.

Q. He occupied the house next door from the time of his marriage?

A. Yes.

Q. Do you know whether any money came to him through the marriage of his wife?

A. As far as I ever knew, I think there was none.

Q. You never heard him or her speak of it?

A. No; and from the fact that her father was a clergyman, and especially a country clergyman, it is probable that he was not too well off.

Mr. MACKEY (interposing): Do not argue the matter.

Mr. HACKETT: No; just state the fact as you know it.

WITNESS: I can testify positively that they never spoke of any such thing to me or in my presence.

Q. You do not know whether she ever had a bank account in Norwich, Connecticut?

A. No; I do not know anything about that.

Q. They never spoke to you about it?

A. Never.

Q. Do you know the time they purchased this property?
A. I did know it.
Q. I do not mean to ask you the date, but do you know of the circumstance of the purchase?
A. Yes.
Q. How long after the purchase was it that these conversations which you have undertaken to relate as having been had between yourself and Mr. and Mrs. Avery took place?
A. Some of them took place before the purchase and some after.
Q. Those that took place after were how long after?
A. They were scattered along all the time from the time of the purchase until shortly before her death. The last one, I think, was two weeks before her death.
Q. How many years after the purchase?
A. I think five years after the purchase. I think it was in 1885 they purchased the property, but I may be entirely wrong about that. I do not profess to know now the date of the purchase. She died somewhere about 1892. It may have been seven years afterwards.
Q. With whom were your conversations held, Mr. Avery or Mrs. Avery?
46 A. With both of them, usually. They would both be present in the room and join in the conversation at the time, so that it would be hard to separate one from the other.
Q. Always both present?
A. Yes.
Q. You never had any conversation with either of them alone?
A. Not in reference to this subject.
Q. You say that Mrs. Avery wanted the title placed in her name because the property was contiguous to her own home?
A. Yes.
Q. What do you mean by her own home?
A. The home that Mr. and Mrs. Avery enjoyed in common together; of course it was his home, and she being his wife it was her home.
Q. She wanted, you say, the title to the property in her name so that she could control it?
A. Well, she had been very much annoyed by parties living in the house before as tenants, and she thought, I suppose, that if she owned it she could control it in that respect better than if the title was in his name, and she thought, for some reason, it would be pleasanter to have it in her name, and he was willing to please her.
Q. What you are now testifying is just your conclusions from the conversations which they had in respect to the property?
A. Yes, and the discussions which took place in my presence.
Q. From those conversations you draw these conclusions which you have stated about what Mrs. Avery thought?
A. Yes.
Q. You do not undertake to give the conversations which they had?
A. Not at all. I do not pretend to give an exact verbal statement

of what took place at the time, because these events occurred something like ten years ago, and my memory of them would not be vivid enough to give the precise words; but I am very confident in regard to the tenor of what was said and done at the time.

Q. This is just your best recollection of the tenor of the conversations?

A. Yes.

Q. Was there anything about those conversations calculated to impress them upon your memory any more than any other conversation you had with them?

A. Nothing except my interest in the parties between whom the conversations occurred as friends of mine.

Q. Well, you would have the same interest in any other conversation which took place between them, sitting there in the house and having social converse together?

A. Only there is a difference in the importance attached to various classes of conversations; a conversation touching title to property is of more importance or consequence than a conversation in regard to some trivial thing, and on that account weighed more
47 with me than would have merely a discussion of some ordinary occurrence. They were not buying property every day, while discussions about a thousand petty little things in the multitudinous affairs of life would not impress me at all.

Q. You were, of course, a warm friend of Mr. Avery?

A. Yes; of both of them.

Q. You have read his will, have you not?

A. Yes; I read it before I signed it—all his wills.

Q. You know of the language used by him in his last will in regard to this particular piece of property and what disposition he wanted made of it?

A. Yes.

Q. And you would like to see that disposition of the property carried out?

A. I have no interest in it whatever. It is entirely a matter of indifference to me whether it is carried out or not; in fact, I would have some sympathy for the other side for the reason that I have had a personal acquaintance with Mrs. Avery's brothers, one of them being a clergyman living in Vineland, New Jersey, and the other, whose name I think is Levi, living in Connecticut and the actuary for an insurance company, and I found them to be very pleasant and genial gentlemen, and I would be very sorry to have them deprived of the benefit of this property if it were not simply a question of fact to certify to here, and I cannot do other than testify as seems to be the case. So far as my personal feelings in the matter are concerned, I would a good deal rather testify on the other side, and especially in a matter where Mrs. Avery's relatives would be benefited by having the property on their side. I should say, by all means let them have it if such is the case, and I would like to turn around and give them the benefit of it.

Q. Do you remember the time when they went down to purchase this property and get the deed for it?

A. Yes; I recall the time. I cannot recollect the date, but I know the time they did it.

Q. What time of day did they go?

A. As to the time of day I do not know. I thought you meant the general time. I was in my office at the time.

Q. Do you know to whose office they went?

A. No.

Q. Do you know from whom they bought the property?

A. Mr. Sands it was who owned it. I do not know what his first name was; they so frequently referred to him in their conversations, and he is the only one whose name I can recollect they did refer to; they may have referred to others and their names slipped my memory, but I remember the name of Mr. Sands because I knew a man by the name of Sands.

Q. Do you know through whom the property had been bought?

A. No.

Q. Do you know at whose office the transaction was consummated?

A. No.

48 Q. Do you remember as matter of fact their going off on a certain day to consummate that sale?

A. No; I do not.

Q. All you know about it is what you learned from them afterwards?

A. Yes; before and after.

Q. You say it was Mrs. Avery's desire that she should control the property after Mr. Avery's death?

A. Yes; during her lifetime.

Q. And if she should die before Mr. Avery it was her desire to control the property during her lifetime?

A. Yes.

Q. I understood you to say that she was much *yonder* than he?

A. Yes.

Q. Was there anything said by her in respect of his likelihood of dying before her?

A. She very often spoke of that; that she was younger, and she thought he would die before she did. In fact, they were both confident of that.

Q. And that was one of her reasons for wanting this property placed in her name?

A. Yes. For the last twenty years of his life he was subject to severe spells of illness, which seemed to be mainly from indigestion, and at times it brought him quite low, and she was afraid he would be carried off a number of times, while during all that period she was younger, able to be around, and was not in any immediate apprehension of death, as he had been.

Q. Are you able to state with any degree of positiveness that this paper (Exhibit A. H. No. 3) is in the handwriting of Mrs Avery?

A. Yes; as much as I could certify to any handwriting at all, I should say that was Mrs. Avery's handwriting. I am not, as I said before, an expert in handwriting, but unless I am positively mis-

taken, according to all ordinary probability, that is certainly her writing.

Redirect.

By Mr. HACKETT:

Q. You recognize this as the affidavit which you made?
A. Yes, sir; that is my signature.
Q. What is the date of it?
A. November 26th, 1892.

Recross.

By Mr. MACKEY:

Q. You made this affidavit at the request of Mr. Avery?
A. Yes.
Q. After the death of Mrs. Avery?
A. Yes.

49 Q. Before you made this affidavit he made known to you, did he not, what he desired to establish?
A. Yes; he discussed the matter with me.
Q. What did he say to you afterwards?
A. He asked me what I recollected in regard to the conversations at the time and preceding the purchase and what I would be willing to state in regard to it at that time.
Q. Did he call your attention to certain conversations that had been had—what he had said and what she had said?
A. No; he did not refresh my memory in any way in regard to anything that was said and done, but simply asked me if I remembered what had been done.
Q. Why did he tell you he wanted you to make the affidavit?
A. Because he was afraid there might be trouble over the transmission of this property to the Smithsonian Institute in consequence of it having been put in his wife's name and she leaving no will.
Q. He stated to you that he desired to establish the fact that it was his money that had purchased it and his desires and his wife's desires in regard to the property?
A. Yes; that it should go as the rest of the property goes.
Q. And that he desired your affidavit for the purpose of establishing the fact, if it could be so established, that it was the desire of his wife that this property should go in this way?
A. Yes.
Q. And that was the purpose for which you made the affidavit?
A. Yes.

LELAND P. SHIDY.

Subscribed and sworn to before me this 18th day of June, 1895.

ALBERT HARPER, *Examiner.*

(Adjourned.)

FRIDAY, *October* 4, 1895—4 o'clock p. m.

Met pursuant to agreement.

Present: Frank W. Hackett, Esq., solicitor for the complainant; Messrs. Chase & Maish, solicitors for the defendant Julia N. Avery, executrix; Franklin H. Mackey, Esq., solicitor for the other defendants; also the examiner, and—

JULIA C. BRADLEY, who, being produced as a witness of lawful age for and on behalf of the complainant and being first duly sworn, deposes and says:

Direct examination.

By Mr. HACKETT:

Q. What is your name and where do you live?

A. Julia C. Bradley; No. 720 C street northeast, in this city.

Q. Did you know the late Robert Stanton Avery and his wife, Lydia Tyler Avery?

A. I did.

50 Q. How did you happen to know them?

A. Through a business transaction, in renting a house from them.

Q. What house did you rent from them?

A. The cottage 120 B street northeast, in this city.

Q. And for how long a time did you rent that house?

A. About four years.

Q. Between the years 1883 and 1887, was it not?

A. Yes.

Q. During that time, between 1883 and 1887, and up to November, 1889, whether or not you frequently met and talked with Mrs. Avery?

A. I did.

Q. Whether or not you ever had any talk with Mrs. Avery with reference to the ownership of the house No. 326 A street southeast, in this city?

Mr. MACKEY: Objected to as leading.

A. I had no conversation with her about it. She made the remark that it was in her name.

Q. Go on and state what you heard her say about the ownership of that house.

A. I do not remember the conversation. I do not remember that we had any conversation, only she often spoke of it being her house; she would just speak about the young lady "living in my house" (I have forgotten her name)—home or *ka*use. That is the way she would speak of it.

Q. Did you live in that house?

A. No, sir.

Q. I want to know if you ever heard Mrs. Avery say anything about the ownership of the house 326 A street southeast, in this city; if so, what was said about it?

A. She called at her house individually; that is all I heard her say about that property. She always called it her house, but I knew through others how she bought or purchased it. I never knew through her that she had a dollar outside of Mr. Avery.

Q. Will you look at that affidavit and state if you signed and swore to it?

A. Yes, sir; that is my signature.

Mr. HACKETT: Examine that affidavit.

Mr. MACKEY: I object to the affidavit being put in the witness' hand and being requested to examine it. I do not know what the contents of the affidavit are, and unless this affidavit is going to be offered in evidence I want to——

Mr. HACKETT (interposing): I will offer the affidavit in evidence. It is now given to the witness to refresh her memory.

Q. Have you read that affidavit?

A. Yes; I have read part of it; the other part I know.

Q. I will now ask you whether or not you remember anything said by Mrs. Avery with regard to the ownership of the house that this affidavit refers to.

51

Mr. MACKEY: What house does the affidavit refer to?

Mr. HACKETT: No. 326 A street southeast, in this city?

A. I know she always called it her house, but that is all I know.

Q. Is that all you remember she ever said about it?

A. Yes. She said in May, 1887, that it was the wish of herself and Mr. Avery that their property should go to the Smithsonian Institute for the advancement of science.

Mr. MACKEY: I object to the answer and here give notice that I will move the court to strike it out as being irrelevant and inadmissible.

Q. Did Mrs. Avery ever talk with you confidentially about that property?

Mr. MACKEY: Objected to.

A. No.

Mr. HACKETT: Counsel here stops because he is taken by surprise by the witness and here gives in evidence the affidavit referred to.

Mr. MACKEY: For what purpose?

Mr. HACKETT: I offer the affidavit in evidence because I am taken by surprise by the witness and I desire the court to see it.

(NOTE.—Said affidavit is herewith filed in evidence and marked Exhibit A. H. No. 4.)

EXHIBIT A. H. No. 4.

Filed October 25, 1895.

Affidavit of Mrs. Julia C. Bradley.

Mrs. Julia C. Bradley, residing at No. 720 C street northeast, in the city of Washington, District of Columbia, being duly sworn according to law, deposes and says that she rented from Robert S. Avery the premises known as No. 120 B street northeast for the four years between 1883 and 1887, and during that time and up to November, 1890, frequently met with and talked with Lydia T. Avery, his wife, who usually collected the rent and attended to the business of the tenancy; that in the many conversations which took place between them the said Lydia T. Avery became confidential and told of her private affairs touching the property that her husband had accumulated by his earnings, and especially the parcel known as No. 326 A street southeast, which she said he had permitted her to take in her own name, although paid for with his money, but that it, together with all the other property, was to go to the Smithsonian Institute for the benefit and promotion of science after their death; that Robert S. Avery had made his will to
52 that effect, and upon the death of either the survivor was to enjoy the estate during life and then its disposition was to be as above indicated; that Mr. and Mrs. Avery had no children, and the dream of their lives seemed to be concentrated in this arrangement of their property; that the said Robert S. Avery had spent many years of his life in the study of scientific matters and treasured as a hobby the publications and adoption for general use of his phonetic alphabet and books.

Affiant further states that the said Lydia T. Avery departed this life on or about the 18th day of November, 1890, and that she has no interest, either directly or indirectly, in the matters herein mentioned.

JULIA C. BRADLEY.

Subscribed and sworn to before me this 12th day of December, 1892.

[SEAL.] MARTIN L. WELFLEY,
Notary Public.

Cross-examination.

By Mr. MACKEY:

Q. Who drew up this affidavit?

A. I have forgotten the party's name, but I would know the name if I heard it called.

Q. Was it a Mr. Langley?

A. I do not know. There is a gentleman on Capitol Hill who swore me, but I do not know his name.

Q. Was it not Mr. John F. Cox, a lawyer?

A. I have forgotten.
Q. Did he have a black mustache?
A. I have forgotten. It does not seem to me that is the name of the party who swore me.

(NOTE.—It is here agreed between counsel that said affidavit is in the handwriting of John F. Cox.)

Q. It was written out and presented to you to sign?
A. It was not written out on the first visit.
Q. It was not written out in your presence?
A. No.
Q. Then it was brought to you and you were asked to swear to it?
A. Yes.
Q. You had a talk with him when he first came there on his first visit?
A. Yes.
Q. And you told him substantially what you have told here today?
A. Yes.
Q. And then he brought back this affidavit and asked you to sign it?
A. Yes.
53 Q. And then you signed it?
A. Yes.
Q. Do you remember whether or not you read it over, or did he read it to you?
A. My recollection is that I was suffering with my eyes and could not read.
Q. Did he read it to you?
A. Oh, every word, I suppose; that is my recollection.

Redirect.

By Mr. HACKETT:

Q. Do you recollect now that at the time you signed this affidavit the statements contained therein were true?
A. Yes.
Q. In this affidavit you say that Lydia T. Avery became confidential and told you of her private affairs touching the property that her husband had accumulated by his earnings, and especially the parcel known as No. 326 A street southeast, which she said he had permitted her to take in her own name, although paid for with his money, but that it, together with all the other property, was to go to the Smithsonian Institute for the benefit and promotion of science after their death, and that Mr. Avery had made his will to that effect, and upon the death of either the survivor was to enjoy the estate during life and then its disposition was to be as above indicated. Do you recall the fact about that?
A. The latter part is *verbatim*, but I do not remember ever having

any conversation with Mrs. Avery about the ownership of that house.

Q. What do you mean by "the latter part"?

A. In 1887 she said that she and Mrs. Avery wished that their property should go to the Smithsonian Institute.

Q. Whether it is true that Mrs. Avery became confidential with you and told you of her private affairs touching the property that her husband had accumulated by his earnings, and especially the parcel known as No. 326 A street southeast, which she said he had permitted her to take in her own name, although paid for with his money, but that it, together with all the other property, was to go to the Smithsonian Institute for the benefit and promotion of science after their death?

A. No, sir; I do not remember a word of that.

Q. When you made this affidavit——

A. (Interposing.) If it was read to me in that form, I do not remember a word of it, because I never heard her say so.

Q. Did you not tell me in this office about half an hour ago that this affidavit was true?

A. I told you that Mrs. Avery said their wish was that their property should go to the Smithsonian Institute.

Q. Did you not read this affidavit, or I read it to you, half an hour ago in this office, and did you not then tell me that the statements contained in that affidavit were true?

54 A. The latter part of it is true. I do not remember one word about any conversation being in there, because I never had any conversation with Mrs. Avery about that house in my life.

Q. Is all that is contained in this affidavit as to confidential conversation untrue?

A. She told me of her private affairs a hundred times, but she never told me about the particulars of the purchase of that house.

Q. Now, I understand you to say that Mrs. Avery never told you of the particulars of the purchase of that house. I never asked you that. Did she ever tell you anything about the ownership of that house?

A. She called it her house.

Q. Was anything said about what would become of it at her death?

A. No, sir; only in 1887, when she made the remark that it was the wish of Mr. Avery and herself that their property should go to the Smithsonian Institute for the advancement of science.

Mr. MACKEY: Objected to as inadmissible, and I here give notice that I shall move the court to strike out that question and answer.

Q. How did she come to tell you that?

A. Well, she did it in her voluminous way of talking. I did not ask any questions.

Q. Did she ever say anything as to the terms of Mr. Avery's will?

Mr. MACKEY: Objected to as leading.

A. My understanding was that his will was not made.

Q. Do you recollect when this conversation took place?

Mr. HACKETT (to witness): When I use the word "conversations" I do not mean necessarily that you said anything when Mrs. Avery got to talking about that house. You may not have said a word and she may have done all the talking, and yet it might be termed a conversation between you; that is what I refer to. When was it?

A. Every time I met her. I do not think I ever met her that she did not say something about "my house." I got a tenant for it and she was always grateful to me for it.

Q. I am not speaking about her house. I am speaking about her saying anything about who paid for that house.

A. I know nothing about that.

Q. She never said anything to you about who paid for that house?

A. We had no conversation about that.

Q. Did she ever say anything to you about who paid for that house?

A. I didn't know that she ever had a dollar except what was Mr. Avery's money.

55 Q. Did she ever say anything to you about who paid for that house?

A. No, sir. JULIA C. BRADLEY.

Subscribed and sworn to before me this 4th day of October, 1895.
ALBERT HARPER, *Examiner.*

Mr. Hackett, solicitor for the complainant, here gives in evidence affidavit of Robert Stanton Avery, subscribed and sworn to before Robert V. Hughes, notary public, on the 15th day of November, 1892, a copy of which affidavit is incorporated in this record, at pages 55 and 56, and which it is agreed between counsel for the respective parties may be referred to and read in evidence in lieu of the original thereof, subject to the objection hereinafter noted; and it is further agreed that if the said Robert V. Hughes, notary public, were called as a witness he would testify that he took the acknowledgement of the said Robert Stanton Avery on the 15th day of November, 1892, to said affidavit.

Mr. MACKEY: I, however, as solicitor for those of the defendants represented by me, object to the admission in evidence of said affidavit because irrelevant and *ex parte* and because it is a declaration of the said Avery made by him after the conveyance of the property to his said wife and after the death of said wife.

Mr. Hackett, solicitor for the complainant, here closes the testimony in its behalf.

Mr. MACKEY: Without a formal session for the introduction of testimony on behalf of those of the defendants whom I represent, I here give in evidence on their behalf a certified copy of the account of Lydia T. Meech, No. 9247, with the Norwich Savings Society, and also of the account of Lydia T. Avery (*née* Meech), No. 51828, with said society.

Mr. Hackett, solicitor for the complainant, admits that if Costello Lippitt, treasurer of said society, were called as a witness he would

testify that said transcripts from the books of said institution are copies of said accounts, but objection is made to the admission in evidence of said transcripts of account because irrelevant.

(NOTE.—And said transcripts are herewith filed in evidence and marked together as Exhibit A. H. No. 5.)

56 EXHIBIT A. H. No. 5.

Filed October 25, 1895.

#51828.

DR. *Mrs. Lydia T. Avery in Ac. with Norwich Savings Society.* CR.

1890.			1877.		
July 1.	To balance down.....	997 39	May 31.	By transfer.....	$576
			1886.		
			Jan. 1.	" dividends to date..	258 67
			1890.		
			Jan. 1.	By dividends to date..	143 18
			1890.		
			July 1.	By dividends to date..	19 54
		997 39			997 39
			1890.		
			July 1.	By balance.....	997 39

I, Costello Lippitt, treasurer of the Norwich Savings Society, certify that the foregoing is a correct statement of the account of Lydia T. Avery to July 1st, 1890, with said society.

COSTELLO LIPPITT, *Treas.*

#9247.

DR. *Lydia T. Meech in Ac. with Norwich Savings Society.* CR.

1856, Sept.	24.	To cash.....	8 27	1850, Oct. 1.	By cash..... 30 "
1858, July	14.	" "	54 60	1851, Jan. 1.	" dividend..... 45
Sept.	27.	" "	20 "	July 1.	" " 90
1859, Jan.	24.	" "	5 60	1852, Jan. 1.	" " 93
May	2.	" "	18 59	"	1. " cash..... 20 "
Aug.	26.	" "	14 37	July 1.	" dividend..... 1 56
"	"	balance.....	575 "	1853, Jan. 1.	" 1 59
				July 1.	" 1 65
				1854, Jan. 1.	" 1 71
				July 1.	" 1 74
				Oct. 3.	" transfer..... 400 "
				1855, Jan. 1.	" dividend..... 13 80
				July 1.	" 14 22
				1856, Jan. 1.	" 14 64
				July 1.	" 15 09
				1857, Jan. 1.	" 15 30
				July 1.	" 15 75
				1858, Jan. 1.	" 16 23
				"	4. " cash..... 20 "
				July 1.	" dividend..... 17 31
				1859, Jan. 1.	" 15 60
				July 1.	" 13 25
				1860, Jan. 1.	" 16 29
				July 1.	" 16 77
				1861, Jan. 1.	..... 17 28
				July 1.	" 14 37
		$696 43			$696 43

57 Dr. Cr.

1862, Jan.	3.	To cash.....	25 "	1861, Aug.	26.	By balance.....	575 "
Sept.	22.	" "	25 "	1862, Jan.	1.	" dividend....	17 25
1865, Jan.	5.	" "	785 40	July	1.	" "	14 17
				1863, Jan.	1.	" "	17 43
				June	24.	" cash	130 "
				July	1.	" dividend....	14 95
				1864, Jan.	1.	" "	21 54
				July	1.	" "	22 20
				1865, Jan.	1.	" "	22 86
			$835 40				$835 40

I, Costello Lippitt, treasurer of the Norwich Savings Society, certify that the foregoing is a correct statement of the account of Lydia T. Meech, dec'd, with said society.

COSTELLO LIPPITT, *Treas.*

Endorsement.

Oct. 14, 1895.

The pl'ff admits that the within copy is a true transcript of the account of Lydia T. Avery (formerly Lydia T. Meech) with the Norwich Savings Society.

FRANK W. HACKETT, *For Pl'ff.*

Mr. Mackey: I have no further proof to offer in behalf of those of the defendants whom I represent.

ALBERT HARPER, *Examiner.*

I hereby certify that the foregoing depositions (comprising sixty-three typewritten pages) were taken down by me in shorthand as an examiner in chancery from the statements when and as uttered by the deponents thereof; that the same were thereafter transcribed by me and reduced to typewriting, and thereupon read and subscribed by the respective deponents thereof in my presence.

I further certify that my fee of $40.00 for taking, certifying, and returning said depositions has been paid to me by the complainant.

And I further certify that I am not of counsel nor in anywise interested in this cause.

ALBERT HARPER,
Examiner in Chancery.

58 *Decree.*

Filed January 27, 1896.

Supreme Court of the District of Columbia.

The Smithsonian Institution *vs.* Levi W. Meech *et al.* } Eq. No. 16496.

Decree.

This cause, coming on to be heard at this term, was argued by counsel; and thereupon, upon consideration thereof, it is adjudged,

ordered, and decreed as follows this 27th day of January, A. D. 1896:

First. That the title to the premises described in the bill—that is to say, to part of lot two (2), in square seven hundred and eighty-seven (787), in the city of Washington, and part of lot lettered "I," as described in deed of Timothy Sands to Lydia Tyler Avery, recorded in Liber 1118, fol. 278, of the land records of the District of Columbia, be, and the same is hereby, vested in the complainant, The Smithsonian Institution, upon the trusts declared by said will, its successors and assigns, free from all claim of every description on the part of the defendants or any of them.

Second. That the defendants, Levi W. Meech, Stephen T. Meech, William W. Meech, and Lucy M. Lord, be, and each of them is hereby, enjoined perpetually from asserting title to the said premises by themselves or agents or representatives as heirs-at-law of the said Lydia Tyler Avery.

Third. That the said defendants, Levi W. Meech, Stephen T. Meech, William W. Meech, and Lucy M. Lord, shall within sixty days from this date execute a conveyance, by way of quitclaim and release, of the above-described lot to the complainant Susan Maria, wife of said Levi; Jaennette, wife of said William W., and James Lord, husband of said Lucy, joining therein, and upon the neglect or failure of said defendants to execute said conveyance within the time herein limited this decree shall operate as such conveyance would do.

Fourth. It is further adjudged, ordered, and decreed that the defendant Julia N. Avery, executrix, be, and she is hereby, authorized and directed to treat the one thousand dollars ($1,000) bequeathed to the said defendants as forfeited for breach of condition annexed to said gift and as having fallen into the residuum and become payable to the complainant unless the said defendants within said sixty days shall signify in writing, to be filed in this court, their intention to comply with the requirement by this decree upon them imposed and their relinquishment of all claim to said premises, as above provided, and in such event the said legacy shall stand as freed from so much of this decree as declares a forfeiture of
59 the same, and they shall thereupon be entitled to receive the said legacy and be free from costs of this suit.

Fifth. The complainant is awarded the costs of suit, except in the case provided in the last foregoing clause of this decree, in which case complainant shall pay all costs.

A. B. HAGNER,
Asso. Justice.

Opinion of Court.

Filed January 25, 1896.

THE SMITHSONIAN INSTITUTION
v.
LEVI W. MEECH *et al.*
} No. 16496. Equity.

The 7th item of the will of Robert S. Avery, dated 22nd of July, 1893, is as follows: "All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

"Having always had a love for the sciences and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire but do not require, that the income derived by the Smithsonian Institution from this gift, may be applied, so far as it may determine, to promoting publications in such type of scientific publications, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require, that such part of said income as the said institution shall determine, shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing *and* an etherial medium, which are treated of in atomic chemistry and which are supposed to govern phenomena of electricity, magnetism, light and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like however to have published first the multiplying tables and also IV place logarithms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences,' and all publications made from the fund shall bear this inscription.

"The property known as part of lot 2 (two) in square 787, in the city of Washington, D. C., being premises No. 326 A St.,
60 S. E., is my property although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The bill charges that the lot on "A" street had been purchased in 1885 from Timothy Sands by Mr. Avery, who paid the entire purchase-money from his own funds, but by his permission it had been

conveyed to his wife, Lydia T. Avery; that by agreement between husband and wife at the time, the wife after his death was only to enjoy a life estate in that lot, which at her death, if she should survive him, was to vest at once in the officers of the Smithsonian Institution, with all the residue of his property not otherwise disposed of by his will; that the wife died in 1890 without having made a will or other transfer of the property, but always having recognized that agreement and promised to perform whatever act might be requisite to affect that purpose; that the officials of the Smithsonian Institution have accepted the provisions of the will in their favor and are in possession of the lot on A street, but that the defendants, the heirs-at-law of the wife, although they claim the legacy given to them by the will, are disputing the devise therein to complainants of the lot on A street, by reason whereof the shares of defendants in the legacy to them belong to complainants according to its provisions. The bill further alleges that Robert S. Avery had for many years resolved to leave his property to the institution, and with that view had executed a will of the 22nd September, 1882, by which he devised and bequeathed all his property (not otherwise disposed of specifically) for that purpose, though leaving it all to his wife for her life; that the husband always regarded the said lot as his property and dedicated to his wife for her life (only in case she should survive him), and the wife, as long as she lived, always acknowledged that such were the terms upon which it was held, and repeatedly made statements to that effect to her friends before and after the execution of the deed of 1885, and had requested an attorney to prepare a will for that purpose, but her sudden death prevented the execution of such an instrument.

The bill prays it may be decreed that the equitable title in the lot on A street remained in Robert S. Avery and at his death became vested in the complainants for the purposes indicated in the will; that the defendants may be enjoined from claiming title to said property as heirs of Lydia T. Avery; that the executrix of Robert S. Avery may be directed to treat the one-thousand-dollar legacy to defendants as having become forfeited for breach of the condition annexed thereto, and as having fallen into the residue for the benefit of the complainants, and that defendants may be required to execute a deed of the lot to complainants.

The defendants answered, and testimony was taken by complainants, but no testimony was adduced on the part of the defendants.

Besides the oral testimony in behalf of complainants, there were filed under the commission the will of Avery of 1882, before referred to; another will executed in December, 1892, reciting the death of his wife without having made a will, and the circumstances
61 and agreements attending said purchase and deed, and again making the same disposition to the complainants; also a first and second codicil to said will, reiterating the recitals and provisions therein in different language, and also the deed of 1885, and the last will of July, 1893.

The case has been well argued and carefully considered.

It is satisfactorily proved in the case that the entire purchase-

money for the A Street property was derived by the husband from his own earnings and in no degree from any property or funds of the wife; that the payment of the entire purchase-money (except of the $600 trust on the property, which was then assumed by Mr. Avery) was contemporaneous with the purchase and the delivery of the deed is shown by the testimony of Mr. Hazelton (Testimony, p. 3), and the note was paid by Mr. Avery to the holder several months before it fell due, as is shown by the testimony of Mr. Brush (page- 32–'3).

This proof fulfils the requirements of the rule that the payment should be made by the beneficiary as a part of the original transaction of purchase, "or that an absolute obligation to pay should be incurred by him" at that time, as is stated by Pomeroy, vol. 2, sec. 1037.

The familiar principles of law governing the case of a resulting trust are well settled. In accordance with them, if the grantee in the conveyance from Sands of the 10th of April, 1885, had been a stranger to Mr. Avery, under the circumstances above mentioned a resulting trust would have arisen immediately from the transaction itself, and the person named in the conveyance would have become a "trustee for the party from whom the consideration proceeded."

1 Perry on Trusts, sec. 126.

On the other hand, the circumstance that the grantee is the wife of the party who paid the money creates ordinarily the presumption that the conveyance was intended as an advancement to her, and rebuts the idea of a resulting trust "as a circumstance of evidence."

1 Perry, sec. 143.

"The question is thus resolved into one of intent," 2 Cox, 94, Dyer *v.* Dyer, "and evidence must, of course, be admitted on the other side."

That parol evidence of incidents or facts tending to contradict the idea of an advancement is admissable is well settled, though the incidents and facts should be so closely connected with the date of the purchase "as to be fairly considered a part of the transaction," whether they be antecedent, coincident, or subsequent. "So the declarations *of the real purchaser*, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time. They are parts of the transaction or words accompanying an act."

62 "And the after declarations *of the nominal grantee* may be used *against* him, but not *in his favor;* but the declarations must be direct and certain, and where possible should be corroborated by other facts and circumstances, for courts will not act upon mere declarations if they are conflicting, vague, or inconsistent with themselves."

Id., sec. 147.

"Thus, if there is any circumstance attending the purchase which explains why it was taken in the wife's or child's name and shows it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted and the inference of a trust will be established."

Id., sec. 146.

"A conveyance to a wife or child will be presumed to carry a beneficial interest, but such consideration is only a circumstance of evidence. * * * The heir is not to be excluded from a resulting trust upon bare conjecture. There must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that none was intended for the heir. * * * But in no case will the court permit the grantee to retain the beneficial interest if there was any mistake on the part of the grantor or any fraud on the part of the grantee."

1 Perry, sec. 151.

If the widow were alive, resisting the present claim to the property, these principles would be applied in the determination of the contentions of the parties, as has been held in numerous cases.

Thus, in 20 Eng. Equity Cases, 328, Marshall *v.* Crutwall, a husband in failing health directed the manager of a bank where he had kept his account to open an account in the joint names of himself and wife and to honor any checks drawn by either, and remarked at the time that the balance of the account would belong to the survivor, of himself and wife. After this time all checks were drawn by the wife and the proceeds applied to household expenses. By his will he appointed his wife and the defendant his executors. A large sum remained to the credit of the account, which the wife claimed as her own. The court held that under all the surrounding circumstances the arrangement at the banker's should be considered as a mode of conveniently managing the husband's affairs and was not intended as a provision for the wife, and that the wife was not entitled to the fund.

The principles were applied in a case in this District where property was bought and paid for by the husband and conveyed to the wife upon the agreement that she should execute a will leaving it to him after her death. After one parcel had thus been purchased and conveyed the wife executed a will in accordance with the agreement. Afterwards another parcel was purchased and conveyed to the wife in the same manner, and the wife died without making any further will, both parties, as the bill alleged, supposing it would embrace the after-acquired property also; but in the then state of the law here it descended to her daughter as in intestacy. Upon the application of the husband the equity court, upon the proofs in the case, held he was entitled to a decree that the heir-at-law should be held to be a trustee for the father. This decree was approved in 20 D. C. Rep., 330, Sherman *v.* Sherman.

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The decision of Chancellor Kent, 2 Johnson's Chancery Rep., 537,

in Livingston *v.* Livingston, cited by the court in the Sherman case, is to the same effect.

It is impossible to read the testimony in this cause without becoming convinced that the contentions of the complainants' bill truly represent the case.

It is evident that Mr. Avery, the husband, had for many years been warmly devoted to the cause of scientific research and had become infatuated with the desire of dedicating whatever property he possessed to those purposes, under the protection of the Smithsonian Institution.

It is equally well established that his wife entirely sympathized with the husband in these wishes and purposes, and no change on the part of either in these positive intentions is disclosed anywhere in the testimony.

His earliest manifestation of these purposes shown in the record appears in his will made 13th September, 1882, by which, after leaving a life estate in his property to his wife, with injunctions to "keep it in good order for its final disposition," he devises and bequeaths it all on her death to the authorities of the Smithsonian Institution, who were to take charge of it and from it create a fund, to be called "the Avery fund" or "the fund contributed by Robert S. Avery and his wife, Lydia T. Avery, for the extension of the sciences," and all publications made with this fund must have a note thereon stating that they have been thus published.

This will, though revoked by the later wills, is evidence of the declared purposes and desires of both husband and wife three years before the purchase of the A Street property.

Its declarations are in entire accord with the testimony of Mr. Shidy, a witness to each of the testamentary papers of Mr. Avery, who was the most intimate friend of both parties from 1873 up to the death of Mr. Avery and was his associate in the Coast Survey Bureau and repeatedly the inmate of their house for weeks together. He heard and took part in the conversations between them as to the plan of purchase of the property on A street and as to the form in which the deed should be made out, and testifies that when the husband yielded to the request of the wife that the property should be conveyed to her it was upon the avowed agreement that it was to be enjoyed by her only as tenant for her life, and only if she should survive her husband, and should be received by the Smithsonian Institution immediately upon the death of the survivor for the scientific objects that both so earnestly desired to foster. Shidy further says that subsequently to the deed both of them fre-
64 quently alluded to the property as being held upon the same understanding, that it was to be hers during her life only if she survived her husband and was to be disposed of at her death, in accordance with the will of Avery, with the rest of his property; that the reasons given for this arrangement were that "the property had been paid for with his money, and that he was anxious the fund should be as large as possible, and he did not contemplate it should be diminished by the amount he should invest in the house;" that Mrs. Avery spoke on various occasions of her purpose

to carry out this agreement and invariably said she hoped to make a will before she became incompetent to do so; that some of these conversations took place before the purchase and some of them subsequently, from that time up to as late as within two weeks of her death.

Mr. Bumpus, the tenant of the A Street house for five years from 1887, testifies the husband executed the lease as lessor in his own name, and always received the rents himself and gave the receipts in his own name; that Mrs. Avery repeatedly told the witness Mr. Avery proposed to leave everything they had at their death to the Smithsonian to establish an Avery fund in the interest of science, and "that the survivor of them was to carry out the wishes of the two."

The declarations of Mr. Avery before the execution of the deed of 1885 and about that time and the declarations of Mrs. Avery at any time before her death are admissable as showing that the *intention* of the parties when the deed was given was that the beneficial interest in the property was not to be placed in the wife. The husband's execution of the lease describing the property therein as belonging to him and his receipts in writing on each pay-day of the rents from the beginning of the tenancy up to his death, all executed with the knowledge and in the presence of the wife and with her approval, although not competent testimony in support of the resulting trust, would still be admissable as evidence of acquiescence on the part of the grantee in the truth of the husband's constant assertions in her presence, thus made by the receipts and by the execution of the lease, of the true intention of the parties when the purchase was made and the deed given.

In the same way the similar statements of the husband, shown by the witnesses to have been repeatedly made, after the execution of the deed, in the presence of the wife, would undoubtedly be competent to sustain the theory of complainants as to that intention. If the husband's statements of that transaction were not correct, it was her duty to have denied them; but, so far from doing so, she uniformally admitted their entire truth. It is impossible to believe she would ever have attempted to repudiate this agreement if she had survived the husband without ascribing to her a moral delinquency inconsistent with her other conduct in the transaction and her respect and affection for her husband. It cannot be doubted that if Mr. Avery had entertained the slightest doubt his wife would not carry out fully their cherished plan he never would have allowed the lot to be conveyed to her, or if such doubts had arisen
65 after the execution of the deed that he would promptly have taken measures to enforce the performance of her pledges. To retain the title and repudiate this promise, under force of which it was obtained, would have been a fraud that equity would not have tolerated.

I have not taken into account the testimony of Mr. Cox, who it was shown was consulted as an attorney by both husband and wife about the execution by the wife of a will leaving the lot to the

Smithsonian Institution, although the better authorities would seem to justify its admission.

38 New Jersey Equity, 402, Gulick *v.* Gulick.
70 New York, 60, Hebbard *v.* Hanghian.
14 B. Mon., 417, Rice *vs.* Rice.
1 Greenleaf, Evidence, sec. 239, note A.
To the contrary is Scranton *v.* Stewart, 52 Ind., 68.

The letter of Mrs. Avery of 26th of October, 1885, to Mr. Hazleton, who prepared the deed (six months after its date) with reference to the settlement of some small balances of rent and taxes due on the house by Sands, the grantor, clearly supports the view that she pretended to no independent claim to the lot. In the few lines of the note she speaks six times of the matter in hand as being of importance *to herself and her husband*, describing both as "we" and "us."

Not a word of evidence in contradiction of the phintiff's contention is offered on the part of the defendants.

As the wife, if living, upon the proofs here would be compelled by chancery to execute all needful conveyances to confirm the title to the institution, so the defendants, who claim as her heirs-at-law, have their consciences affected by the proofs and should be made to comply with the duty that devolved upon their intestate.

In 24 Beavan, 679, The Queen *v.* Chapel of St. George, it was held that a resulting trust arises in favor of the grantor where lands were conveyed on charitable trusts to be afterwards declared and no subsequent declaration of the trust is made.

It would be extraordinary, indeed, that the Smithsonian Institution should be obliged out of the benefactions of the husband to create a fund to be called "the fund contributed by Robert S. Avery *and his wife, Lydia T. Avery,*" if her heirs should continue their efforts to frustate the meritorious objects they both had so much at heart.

The objection that the purpose pointed out by the testator is chimerical in the opinion of the heirs is nothing to the purpose. The possibilities of scientific research are very great, but, however illusory the designs of the testator may appear to be, in the present instance the will expressly provides that he does not *require* the Smithsonian Institution to apply the property in the manner suggested, but leaves to its authorities the selection of the character of scientific researches to which the gifts may be applied.

Upon the entire case I am satisfied the prayer of the bill should be granted, and that a decree should be passed declaring that upon the death of Robert S. Avery the full title to the A Street lot
66 became vested in the complainant for the purpose indicated in the bill.

Second. By item six of the bill of 1893 the testator provided: "I bequeath to the sister and brothers of my late wife one thousand dollars (1,000), to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing sub-

stantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in the will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named."

It is insisted the condition attached to this legacy is powerless to effect a forfeiture, notwithstanding the present position of the legatees in resisting the devise of the A Street lot to the complainant.

In my opinion, the provision is not of the character that is held by the courts to be regarded as merely *in terrorem*, but is valid in law, and is such an one as the testator had a right to impose, and it may well be enforced.

2 Redfield on Wills (298).

But the indisposition of the courts of equity to enforce forfeitures might operate to prevent a decree for its operation against the defendants under conditions that might arise in this cause.

The conduct of the defendants in this respect has a wider effect than the mere forfeiture of the legacy. Their acts set in operation the law governing the principle of *election* which must apply to every person whom a will proposes in any particular to benefit.

2 Redfield (352).

The defendants, with full knowledge of all the facts, are claiming the legacy of $1,000 given them by the will as free from all conditions, while they dispute the devise of the A Street lot, made by the same instrument to the complainant. This is at variance with the established rule that one cannot be allowed to claim under a will and against it. The operation of this rule is extensively considered in McElfresh *v.* Schley, 2 Gill, 200, where the court adopted the principle as applicable to that case to its full extent. In the words of the court, "it is only carrying out a plain intent of the testator and giving to the residuary legatee that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject the rule is that a man shall not take a benefit under a will and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and at the same time what is devised to another, although but for the will it would be his; hence he is driven to his election to say which he will take."

None of the exceptions to the application of the rule apply to the present case.

67 In 2 Redfield, chapter 2, sec. 41 (370), the author, quoting from a recent California case, says: "Although the testator had no legal power to dispose of the property of another, yet, if he assumes to do so by his will and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator."

24 Ohio N. S., 11, Huston *v.* Cone.

17 Pickering, 308, Hyde *v.* Baldwin.

If the defendants shall now relinquish their opposition to the devise to the complainants of the lot on A street, the court would decline to enforce the forfeiture of the $1,000 legacy, notwithstanding their opposition heretofore to the devise in question, but not otherwise.

I will sign a decree founded upon the principles of this opinion.

A. B. HAGNER,
Asso. Justice.

January 25, '96.

SMITHSONIAN *vs.* MEECH. } No. 16496.

Hackett.
Franklin H. Mackey.

The clerk will enter an appeal for all the defendants except Julia N. Avery from the decree entered herein on the 27th of January, A. D. 1896, to the Court of Appeals of the District of Columbia and issue citation to the plaintiff (appellee.)

FRANKLIN H. MACKEY.

Appeal as ordered entered.

BY CL'K.

'96, 2, 7.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION *vs.* LEVI W. MEECH, STEPHEN T. MEECH, W. W. Meech, Lucy M. Lord, and Julia N. Avery, Executrix of the Estate of Robert Stanton Avery, Deceased, *et al.* } No. 16196. In Equity.

The President of the United States to the Smithsonian Institution, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the supreme court of the District of Columbia on the 7th day of February, 1896, wherein Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech,
68 W. W. Meech, and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 7th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 10th day of February, 189–.

FRANK W. HACKETT,
Attorney for Appellee.

Stipulation of Counsel.

Filed February 10, 1896.

In the Supreme Court of the District of Columbia.

THE SMITHSONIAN INSTITUTION
vs.
LEVI W. MEECH *et al.*
} In Equity. No. 16496.

It is hereby, this 10th day of February, A. D. 1896, stipulated and agreed by and between the parties to this cause that in lieu of the bond heretofore directed to be given by the appellants they may deposit the sum of one hundred dollars in the registry of the court, which said one hundred dollars shall take the place of said bond, subject to the right of appellee to require for cause that the same be increased.

THE SMITHSONIAN INSTITUTION,
By FRANK W. HACKETT.
LEVI W. MEECH ET AL.,
By FRANKLIN H. MACKEY.

MEMORANDUM.—1896, February 10, $100 deposited by the defendants in lieu of bond for appeal.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia,
} ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 124, inclusive, to be true copies of originals in cause No. 61496, in equity, wherein The Smithsonian Institution is complainan- and Levi W. Meech, Stephen T. Meech, W. W. Meech, Lucy M.
69 Lord, and Julia N. Avery executrix, are defendants, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of February, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 558. Levi W. Meech *et al.*, appellants, *vs.* The Smithsonian Institution. Court of Appeals, District of Columbia. Filed Mar. 12, 1896. Robert Willett, clerk.

70 WEDNESDAY, *April 22d, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

The argument in the above-entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellants, and was continued by Mr. F. W. Hackett, attorney for the appellee, and was concluded by Mr. F. H. Mackey, attorney for the appellants.

71 LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech, W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Opinion of Court.

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit in equity filed by the appellee, The Smithsonian Institution, to establish its title to certain real estate in the city of Washington, against the claims of the appellants.

One Lydia Tyler Avery, wife of Robert Stanton Avery, died in the city of Washington, where both had resided for many years, on November 18, 1890, leaving her husband surviving her. She died intestate and possessed of a fee-simple estate in a part of lot No. 2, square 787, in the city of Washington, to which the appellants who are her nearest relatives now claim to be entitled, as her heirs-at-law.

Robert Stanton Avery, the husband, who was about twenty years older than his wife, survived her nearly four years, dying on September 12, 1894, in the eighty-seventh year of his age. He left a will executed on July 22, 1893, whereby, among other bequests, he left $1,000 to be equally divided between the sister and brothers of his late wife, the appellants in this case, upon the condition that the legatees should "acquiesce in this will," and providing that the share or shares of any disputing this will should go to the residuary legatee thereinafter named. The residuary legatee and devisee purported to be the "Smithsonian Institution," the appellee in this case; and the clause of the will purporting to devise and bequeath the residue of the estate was as follows:

"All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed, and wheresoever situate, I hereby give, devise and bequeath unto the Smithsonian Institution, a body corporate by virtue of the laws of the United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever."

Thereafter in the will the testator proceeded to give as his reason for so disposing of his property his great love for science and his desire for the diffusion of knowledge, for which he had long been toiling in humble capacities, in which he stated that he had acquired most of his property; and he expressed his desire that the fund derived from the residuary bequest should be known as "the Avery fund," or "the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences." He indicated also the special mode in which he preferred that the fund should be used. He then proceeded to make the following statement:

"The property known as part of lot 2 (two), in square 787, in the city of Washington, D. C., being premises No. 326 A St. S. E., is my property although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

It is over the ownership of this lot of ground so described that the present controversy has arisen, the appellants, as already stated, claiming to be entitled to the property as the heirs-at-law of Lydia T. Avery, the wife, who died seized and possessed of it; and the appellee claiming it as the residuary devisee under the will of the husband Robert S. Avery by virtue of a resulting trust.

Robert S. Avery was for many years in the service of the United States as an employee of the Coast Survey Bureau. He was frugal, lived a retired life, and devoted himself to scientific research. He and his wife had no children; and it would seem to have been for several years a favorite scheme with him and the purpose of both that their property after their death, and the death of the survivor of them, should be devoted to the promotion and diffusion of scientific knowledge. It is claimed that there was an understanding between the two that for this purpose the property should be left to the Smithsonian Institution by wills to be executed by each of them, reserving a life estate to the survivor. But, as already stated, Mrs. Avery died intestate, and without making any testamentary or other disposition whatever of her property, which is that in controversy here. Mr. Avery, more than two years after the death of his wife, made the will that has been mentioned.

In the year 1882, during the lifetime of his wife, and when it was the confident expectation of both that, in consequence of his greater age and infirmity, she would survive him, he had made
72 another will, by which he had devised and bequeathed all his estate to her for life, and upon her death to the Smithsonian Institution for the same cherished purposes as in his later will. There was no mention in this will of any specific property; nor had the property in controversy here been at that time purchased. That purchase was made in 1885; and the deed of conveyance of it by the vendor to Mrs. Avery was the ordinary form of deed of conveyance in fee-simple.

About two years after the death of Mrs. Avery, in November, 1892, Mr. Avery made an affidavit, which has been incorporated into the record before us, and by which he sought to affect the title to the property in controversy. In this affidavit, he states that "at

the time of the purchase he was not in good health, and his wife, Lydia Tyler Avery, being of the opinion that she would outlive him he permitted said property to be transferred to her upon the then expressed condition that she was to make a will in his favor in the event of his surviving her, as he had already done in her favor in the event of her surviving him, the mutual understanding being that the combined property was to be left to the survivor during life and then to be disposed of by will for scientific or educational purposes, as had been talked over and agreed upon by them in conversations between them, this disposition of all their estate being so made in consequence of their married life not having been blessed with children." And he went on further to state "that the entire consideration money paid over for said property was saved exclusively from his earnings; that his wife, Lydia Tyler Avery, departed this life on the eighteenth day of November, A. D. 1890, without issue and without a will, although he, at her request, during her last illness had prepared one embodying her wishes as herein expressed, but at the time of presenting it to her for execution she was too far gone to execute the same, and never thereafter rallied sufficiently to perform any such act."

Four or five other persons were also at the same time or thereabouts induced to make affidavits in support of the statements contained in Mr. Avery's affidavit; and one of these is given in the record.

Shortly afterwards, under date of December 20, 1892, Mr. Avery executed a codicil to his will of September 30, 1882, in which he repeated the substance of his affidavit; and under date of May 19, 1893, he executed another codicil to it, not important to be here recited. Subsequently, this will and the codicils to it were superseded by the will of July 22, 1893, which is the will that has been admitted to probate.

After the death of Mr. Avery, the appellee, The Smithsonian Institution, took possession of the property in controversy, and still continues in the possession of it. On May 15, 1895, it caused a paper to be recorded among the land records of the District of Columbia, purporting to be a declaration of ownership of the property, and to which was annexed the affidavit of Mr. Avery heretofore referred to, which was also transcribed among the records. On May 23, 1895, the appellants, claiming the property as heirs-at-law of Mrs. Avery, made formal demand upon the appellee for the possession of it, which demand was refused. Thereupon, on June 4, 1895, The Smithsonian Institution, as complainant, instituted in the supreme court of the District of Columbia the present proceedings in equity, in which it stated most of the substantial facts here enumerated, together with some other circumstances claimed to show the ownership of the property in controversy by Robert S. Avery, and by which it was sought, 1st, To have the equitable title to that property decreed to be in the complainant; 2d. To have the defendants enjoined from claiming title thereto, and to require them to execute deeds of conveyance thereof to the complainant; 3d. To require the executrix of the will of Avery to treat the legacy of $1,000 to

the appellants as forfeited to the appellee on the ground that they were disputing the testator's will; and, 4th. To have general relief.

Testimony was taken on behalf of the complainant, much of it under objection, which seems to a great extent to have been very properly interposed. The strongest part of this testimony for the complainant is that of one Leland P. Shidy, an associate of Avery in the Coast Survey office, and an intimate friend and frequent guest of Mr. and Mrs. Avery. He makes this statement:

"I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all; and after that was decided, they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so, and had the deed made out in her name."

"She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name."

"It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institution."

There was no writing whatever of any kind produced signed by Mrs. Avery that had reference to the property, except a letter or memorandum, apparently addressed by her to her attorney, or the attorney who had prepared the deed to her, in which she uses the expression "*we*" and "us" in connection with the papers and some small payments that remained to be adjusted. The paper proves nothing, certainly nothing in favor of the complainant.

The defendants took no testimony, beyond offering in evidence two bank accounts of Mrs. Avery, both with the same banking institution in Norwich, Connecticut, from which place she seems to have come, and each of them, it would seem, a distinct account—one showing a balance of $696 to her credit on July 1, 1861, and the other showing a balance of $997.39 to her credit on July 1, 1890.

Upon the hearing, the supreme court of the District of Columbia rendered a decree in favor of the complainant, The Smith-
73 sonian Institution, to the full extent claimed; and the learned justice who sat in the case filed a very able and elaborate opinion, which is found in the transcript before us, in support of the conclusion reached by him. From that decree the defendants have prosecuted the present appeal.

We think that there can be no doubt whatever of the purpose of the deceased Robert S. Avery to devise to the Smithsonian Institution for the promotion of scientific education, not only such property as he may have had in his own name and under his direct control, but likewise, so far as he might control it, the property standing in his wife's name and in controversy in this suit. And we think, also, that it is highly probable that Mrs. Avery sympathized

in her husband's enthusiasm for science, and had similar purposes in reference to her own property, or the property here shown to have been placed under her exclusive control. But it is very plain that, whatever may have been her purpose in that regard, she failed to carry it into effect. Whether she afterwards changed her mind, or whether she for some reason postponed the execution of her will, the fact remains that she made no testamentary disposition of this property, in accordance with what would seem to have been the wishes of her husband, and what is claimed to have been the understanding or agreement between them. It is plain that, if there was any agreement or understanding of that kind between the two, it was, as set forth in the affidavit of Avery and the testimony of Shidy, that she was to retain this property for her life, and that she was to make a will, devising it upon her death to the Smithsonian Institution for the scientific purposes specified. This is the only understanding sought to be shown to have existed between them.

Now, it requires no elaboration of argument or citation of authorities to show that this understanding or agreement, even if proved beyond any possible doubt, could not be enforced by a court of equity against the objection of the holders of a legal title and the plea of the statute of frauds, in the absence of any memorandum in writing by which it could properly be evidenced. Such an agreement would simply raise an express trust, which would be null and void and incapable of being enforced under the statute of frauds. The trust was that Mrs. Avery should make a certain will; she has made no will of any kind; and there is no power in the courts to make a will for her.

But this is conceded by the appellee, although both the bill of complaint and the testimony are largely devoted to the establishment of this express trust. The effort is to show that, notwithstanding this proof of an express trust, the money for the purchase of the property in question was paid exclusively by Mr. Avery from his own earnings, and that therefore there was a resulting trust in his favor.

A resulting trust arises by operation of law, when one person buys an estate and pays the purchase-money therefor, but takes the deed in the name of another person. The person, in whose name the deed is taken, becomes a trustee for the person who has paid the money; and the trust so created is exempted from the operation of the statute of frauds by the express provision of that statute itself. But it is well-settled law that this does not apply to the case where the deed is taken in the name of a person, such as a wife or a child, for whom the person who pays the purchase-money is under any obligation, legal or moral, to provide. In this case no presumption of a resulting trust arises; and it is incumbent on the person who claims the existence of such a trust to show it by clear, positive, and unequivocal proof.

This reduction, which may be regarded as elementary law, we do not understand to be controverted in this case; and accordingly the appellee, for whose benefit the resulting trust is now claimed, has undertaken the burden of showing its existence, as it was bound to

do by positive proof to that effect. But we fail to be convinced that it has succeeded in the effort.

The proof in such case, it has been said, must be clear, positive and unequivocal. It must leave nothing to doubtful inference, or to deductions from loose and casual conversations or ambiguous circumstances. The right to property is too sacred to be made dependent upon the doubtful recollection of casual conversation sought to be reproduced long after their occurrence and when the parties to them have passed away, and explanation by those most competent to explain is no longer possible. This is the rule laid down by all the authorities; and we are compelled to hold that, tested by this rule, the testimony of the appellee, on whom the burden of proof was imposed, wholly fails in our opinion to establish a case of resulting trust.

The testimony of all the witnesses for the appellee, except one, simply tends to prove that it was the money of Robert S. Avery, and not that of his wife, that was paid for the property in question. But we assume this to have been the fact, although we do not by any means regard it as satisfactorily proved. As already stated, conclusive proof of it would not establish a resulting trust as between husband and wife. There must be something further than that, some satisfactory evidence to rebut the presumption of a gift or advancement by the husband to the wife. The only other evidence in that regard, excepting that of the one witness to whom we have referred, is to the effect that the property was sometimes mentioned by Mrs. Avery as their joint property, and that Mr. Avery once or oftener executed a lease of the property in his own name and collected the rents. But it is not unusual for the merest agents to rent property in their names which has been placed in their hands for management, and to collect the rents; and most assuredly no just inference of joint ownership, certainly no reasonable inference of real ownership in her husband antagonistic to her own can be drawn from occasional expressions used by Mrs. Avery, such as "we," "us," "our," "our property." For such expressions there is a greatly more reasonable and more obvious explanation. On the other hand, the testimony of several of these witnesses goes to show that Mrs. Avery claimed the property as her own, and that she desired to have the title in herself in order that she might control it. And such control, of course, would be inconsistent with any theory of a resulting trust in her husband.

74 Only one witness, Mr. Leland P. Shidy—whose opportunities for knowledge, it is true, seem to have been exceedingly favorable—testifies to any agreement or understanding between the husband and wife with regard to this property, or to any circumstances that might be supposed to tend to rebut the presumption of a gift or advancement by the husband to the wife. For, of course, we cannot regard as testimony the affidavit of Robert S. Avery made after the death of his wife, and to which we have already referred as stating most strongly the contention on which the appellee relies. But the testimony of Shidy, even if we assume that his testimony alone could overcome the sworn answer of the defendants in

the case, wholly fails to establish a case of resulting trust. The portion of this testimony which is strongest for the appellee has already been cited; and it simply shows that Mrs. Avery took the title to the property because she wished to control it, and with the understanding that she should hold the property during her lifetime, and make a will transferring it at her death to the Smithsonian Institution.

This testimony is corroborated by that of Mr. John F. Cox, if his testimony is admissible, a point which we need not decide here. He seems to have been called in professionally by Mr. Avery to make his will for him, and also a will for Mrs. Avery. He states that Mrs. Avery "said that her husband had permitted her to take the property in her own name, and that she wished to make a will that would follow out his intentions as to his own property." And he adds that the reason why he did not draw a will for her was that she would postpone it until after Mr. Avery's will; that she could make hers afterwards; and that she knew that he was going to die before she would, since he was so very ill.

Now, all this shows very clearly that Mrs. Avery regarded the property as her own, to be controlled exclusively by herself, but intending to devise it at her death to the Smithsonian Institution. Not even a life estate was contemplated to be reserved to her husband in the event of his survival of her, for that event seems to have been considered highly improbable by both of them in view of Mr. Avery's greater years and feebler health, although it was that event which actually occurred. So, instead of being proof of a resulting trust in favor of Robert S. Avery, the testimony shows conclusively that no such trust was intended or contemplated by the parties. If the transaction can be construed as creating any trust whatever, and it is not at all clear that it does create a trust of any kind, the trust is a conventional one, inconsistent with any theory of a resulting trust. There may be cases where, upon the failure of an express agreement, parties may fall back upon a resulting trust; but that can only be where the resulting trust exists independently of the express agreement and is not inconsistent with it. The failure of an express trust or of a specific agreement in regard to real estate to prove effective does not authorize parties by that failure alone to fall back upon a resulting trust when none was intended in the transaction.

We have no desire to dissent from the statement of the law by the learned justice who heard this case in the court below, as contained in his very able and elaborate opinion which we find in the record; but we fail to find in the record the testimony which in our opinion is required to support it.

With reference to the legacy of $1,000 given to the appellants by the testator Robert S. Avery, and which is sought to be forfeited in this proceeding on account of the alleged disputing of the will by the appellants, it is not seriously controverted by the appellee that the decree of the court below in that regard must be modified. Forfeiture is not greatly favored in equity under any circumstances; and this case is not one for the enforcement of a forfeiture. It may

be suspected that the claim of the appellants to the property in dispute was the very thing against which the testator was solicitous to guard; but clearer and more unequivocal language for that purpose should have been used to justify a court of equity in decreeing a forfeiture in this case. Claiming property which it is contended did not pass under the will, and which we here hold did not pass under the will, cannot in any proper legal sense be regarded as a disputing of the will.

We are of opinion that the decree of the supreme court of the District of Columbia in this case is erroneous, and that it should be reversed, with costs; and that the cause should be remanded to that court, with directions to vacate that decree, and to dismiss the bill of complaint. And it is so ordered.

75 TUESDAY, *May 12th, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,

vs.

THE SMITHSONIAN INSTITUTION.

No. 558. April Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court with directions to vacate that decree and to dismiss the bill of complaint.

Per MR. JUSTICE MORRIS.

May 12, 1896.

76 WEDNESDAY, *May 20th, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,

vs.

THE SMITHSONIAN INSTITUTION.

No. 558.

On motion of Mr. F. W. Hackett, attorney for the appellee in the above-entitled cause, it is ordered by the court that said appellee be allowed an appeal to the Supreme Court of the United States.

77 Court of Appeals, District of Columbia.

LEVI W. MEECH *et al.*, App'ts,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Stipulation.

It is agreed between the parties that the value of the property involved in this suit was at the date of taking the appeal greater than five thousand dollars ($5,000), exclusive of interest and costs. It is further stipulated that this agreement be made a part of the record on appeal to the Supreme Court of the United States.

THE SMITHSONIAN INSTITUTION,
By FRANK W. HACKETT, *Att'y.*
LEVI W. MEECH ET AL.,
By FRANKLIN H. MACKEY.

Endorsed: Court of Appeals, D. C., April term, 1896. No. 558. Levi W. Meech *et al.*, appellants, *vs.* The Smithsonian Institution. Stipulation of counsel as to value of property. Court of Appeals. District of Columbia. Filed May 22, 1896. Robert Willett, clerk.

78 MONDAY, *June 1st, A. D.* 1896.

LEVI W. MEECH and SUSAN MARIA MEECH, His Wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, His Wife; Lucy M. Lord and James Leander Lord, Her Husband, Appellants,
vs.
THE SMITHSONIAN INSTITUTION. } No. 558.

Upon motion of Mr. F. W. Hackett, attorney for the appellee in the above-entitled cause, the bond on appeal to the Supreme Court of the United States is fixed at the sum of four hundred dollars.

79 Know all men by these presents that we, The Smithsonian Institution, as principal, and John B. Henderson, as surety, are held and firmly bound unto Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, in the full and just sum of four hundred dollars, to be paid to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia,

in a suit depending in said court between Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, appellants, and The Smithsonian Institution, appellee, a decree was rendered against the said Smithsonian Institution, and the said Smithsonian Institution having appealed from said decree and obtained a citation directed to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that is the said Smithsonian Institution shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

THE SMITHSONIAN INSTITUTION, [SEAL.]
By G. BROWN GOODE, *Acting Secret'y.* [SEAL.]

[Seal of the Smithsonian Institution.]

JOHN B. HENDERSON. [SEAL.]

Approved by—

R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 558. Levi W. Meech *et al.*, appellants, *vs.* The Smithsonian Institution. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 1, 1896. Robert Willett, clerk.

80 UNITED STATES OF AMERICA, *ss:*

To Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Smithsonian Institution is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 1st day of June,

in the year of our Lord one thousand eight hundred and ninety-six.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.

LEVI W. MEECH,
By FRANKLIN H. MACKEY,
His Solicitor.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 1, 1896. Robert Willett, clerk.

81 Know all men by these presents that we, The Smithsonian Institution, as principal, and John F. Rodgers, as surety, are held and firmly bound unto Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, in the full and just sum of five thousand dollars, to be paid to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, and their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, appellants, and The Smithsonian Institution, appellee, a judgment was rendered against the said Smithsonian Institution, and the said Smithsonian Institution having duly taken an appeal, as appears of record in the clerk's office of the said court, to reverse the said judgment, and a citation was duly issued, directed to the said Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaenette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, citing and admonishing them to be and appear at a Supreme Court
82 of the United States, to be holden at Washington, within 30 days from the date thereof, which citation was duly served; and whereas the said Smithsonian Institution has already furnished security for the costs of said appeal and desires to furnish further security as a supersedeas:

Now, the condition of the above obligation is such that if the said Smithsonian Institution shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, then

the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—
THE SMITHSONIAN INSTITUTION,
[Seal of Smithsonian Institution.]
By G. BROWN GOODE,
Acting Secretary. [SEAL.]

JOHN F. RODGERS. [SEAL.]

Witness:
J. LOUIS WILLIGE.
LEONARD DAMMANN.

Approved by—
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

June 13th, 1896.

(Endorsed:) No. 558. Levi W. Meech *et al. vs.* The Smithsonian Institution. Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 15, 1896. Robert Willett, clerk.

83 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 82, inclusive, contain a true copy of the transcript of the record and proceedings of said Court of Appeals in the case of Levi W. Meech and Susan Maria Meech, his wife; Stephen T. Meech; W. W. Meech and Jaennette Meech, his wife; Lucy M. Lord and James Leander Lord, her husband, appellants, *vs.* The Smithsonian Institution, No. 558, April term, 1896, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 18th day of June, A. D. 1896.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,323. District of Columbia Court of Appeals. Term No., 191. The Smithsonian Institution, appellant, *vs.* Levi W. Meech *et al.* Filed June 19, 1896.